

# **Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia**

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*It is the year 2097. Ninety years ago the planet Terra was discovered by the Ozakas, a race from a faraway galaxy. Terra was a convenient refuelling port on the trade route to Alpha Centauri and, in addition, had a wealth of natural resources on and below its sea bed, which were almost completely undisturbed. The Ozakas decided to colonize the newly discovered Class M planet.*

*Indigenous sentient beings had already evolved on the planet. They were so far behind the Ozakas in the level of their civilization, however, that they were disregarded as easily as their attempts to resist colonization were crushed. Ozakan colonists settled the planet despite resistance from the indigenous sentients. The land tenure system of the indigenous sentients was primitive: The use of paper and electronic records instead of the universal standard — encoded DNA sequences — was too uncertain and inefficient to be integrated into the Ozakan economic system.*

*In the past thirty years the indigenous sentients have become more assimilated into Ozakan society and have begun to press for compensation or so-called "aboriginal" land rights.*

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## I. INTRODUCTION

Indigenous peoples<sup>1</sup> and their special concerns were first officially recognized by the United Nations in 1957 with the International Labour Organization (ILO) Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.<sup>2</sup> Recently, the plight of indigenous people throughout the world has once again been very much in the public eye. This is particularly true in countries where indigenous groups have begun to resort to violent resistance in furtherance of their goals.<sup>3</sup> Indigenous populations exist worldwide<sup>4</sup> and pose a challenge to the governments within whose territories their domains lie. Following the United Nations celebration of 1993 as the International Year of the World's In-

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1. This Article adopts the definition of indigenous peoples used in the Study of the Problem of Discrimination Against Indigenous Populations submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities:

[T]hose [people who], having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider[ed] themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.

Jose R. Martinez Cabo, Study of the Problem of Discrimination Against Indigenous Populations, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986). The definition also emphasizes the determination of these groups to "preserve, develop and transmit" their lands, ethnic identity, and culture to future generations. See *id.*

2. ILO, 40th Sess., No. 107, 328 U.N.T.S. 247 (1957).

3. For example, the Zapatista National Liberation Army in Chiapas, Mexico, claims to be fighting for the rights of the region's indigenous Mayan population. See Gavin O'Toole, Mexico: The Day the Souls of the Dead Return, *The Guardian* (London), Oct. 31, 1995, at 2-3, *available in* 1995 WL 9948875; Paul Rodgers, Rebels Draw Hard Line in Native Soil, *The Independent*, Sept. 25, 1994, at 9, *available in* LEXIS, News Library, Indpnt File (describing the violent resistance of the people of Bougainville Island to the ecological depredations of a mining company). The defensive tactics that indigenous people use to protect their lands and culture are becoming more sophisticated. Instead of fighting the battle only on their home soil, the tribes target the foreign corporations who exploit their ancestral lands in the companies' own home countries. The tactics include shareholder resolutions to force the companies to be environmentally responsible, lawsuits against companies in their home jurisdictions, and coalitions with environmental and religious organizations on the international level. See Pratap Chatterjee, Environment: Indigenous Peoples Say Mining Destroys Land and Lives, *Inter Press Service*, May 13, 1996, at 6-7, *available in* 1996 WL 10242709.

4. The Secretary of the U.N. Working Group on Indigenous Populations estimated that 300 million (or four percent) of the world's population are indigenous. See Carolyn Davis, The Battle for Rights, *The Plain Dealer* (Cleveland), Feb. 13, 1994, at 1C. They are found in countries as diverse as Norway (the Sami), Botswana (the San), and New Zealand (the Maori). See *id.*

digenous People,<sup>5</sup> the General Assembly extended the celebration, proclaiming the 1990s to be the Decade of the World's Indigenous People.<sup>6</sup>

A 1993 ILO report revealed that, as compared to national populations, the world's indigenous people have higher rates of infant mortality, unemployment, alcoholism, diseases, ill health, and incarceration.<sup>7</sup> Indigenous groups in the poorest developing countries confront more severe hardships than their counterparts in developed countries: The term "Fourth World" has been used to describe the social and economic conditions endured by indigenous peoples.<sup>8</sup> Yet even in the most developed countries — for example, the United States, Canada, and Australia — the indigenous standard of living, including economic, educational, and other basic human standards, often are inferior to those of the general population, and a pale shadow of the status and privileges of dominant groups in the society.<sup>9</sup> One commentator states: "Indigenous and tribal peoples are always, always at the bottom of the social and economic heap."<sup>10</sup>

The central issue facing indigenous peoples in the 1990s is their right to ancestral lands<sup>11</sup> and the security of their land

5. See Davis, *supra* note 4. According to Davis, the Year was the most poorly funded such UN celebration, reflecting "the international ambivalence toward indigenous peoples' rights." *Id.*

6. See *id.*; see also Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 *Harv. Hum. Rts. J.* 33, 34 (1994). A central purpose of the decade-long celebration is the creation of a permanent forum for indigenous peoples within the United Nations system. See *id.* at 34, 70.

7. Robin Wright, *World's Indigenous Peoples Are the Poorest, Study Says*, *The Sacramento Bee*, June 13, 1993, at A21. In this Article, "national population" refers to the dominant population.

8. See, e.g., Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 *Sw. J.L. & Trade Am.* 293, 297 (1995); see also Robert K. Hitchcock, *International Human Rights, The Environment, and Indigenous Peoples*, 5 *Colo. J. Int'l Env'tl. L. & Pol'y* 1, 2 (1994).

9. See Hitchcock, *supra* note 8, at 5. For example, according to the 1990 census, 31% of all Native Americans live below the poverty level. See David H. Getches et al., *Federal Indian Law* 16 (3d ed. 1993). Their per capita income, at approximately \$8,300, is the lowest of all racial groups in the United States. See *id.* As of 1993, their unemployment rate was 45%, approximately 37% higher than the rest of the United States population. See *id.*

10. See Wright, *supra* note 7 (quoting Michel Hansenne, ILO Director-General).

11. See Johanna Son, *Asia-Development: ASDB, Indigenous Groups Size Each Other Up*, *Inter Press Service*, Jan. 18, 1996, *available in* 1996 WL 7881028 ("So long as the indigenous people do not have tenure they are at best interlopers on their own lands, and at worst they are criminals." (quoting Dev Nathan and Govind Kelkar of the Asian Institute of Technology)).

ownership. Land ownership is intertwined with the ideal of self-determination of indigenous peoples, along with their ability to choose the extent of their participation in the lives of the nations that have grown up around them, their ability to preserve their unique cultural heritage without outside interference, and their ability to choose the lifestyles that they desire.<sup>12</sup> Also of persistent concern is the degradation of the physical environment of the territories of indigenous peoples by outside economic development.<sup>13</sup> In order to foster economic development, developing countries need access to the lands and natural resources that lie within their territories. However, where these resources and lands lie within the territories of indigenous peoples, conflicts arise and governments are confronted with choosing between protecting indigenous land policies and pursuing development.

Among the developing countries that are struggling with the problems of their indigenous people are Brazil and the Philippines. In both countries, indigenous peoples face the three-pronged threat of increased mining, logging, and a growing outside population.<sup>14</sup> The products of the forest are valuable fodder for a nation's development,<sup>15</sup> so in the race toward development, both Brazil and the Philippines are consuming the forest homes of their indigenous

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12. See, e.g., S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 *Ariz. J. Int'l & Comp. L.* 1, 4-5 (1991). In Colombia, the Uwa Indians threatened to commit mass suicide if mining exploration were allowed to take place on their land. A license was granted to the mining company after consultation with the Indians despite the Indians' disagreement. See Pamela Mercer, *Land Clash Pits Indians Versus Oilmen in Colombia*, N.Y. Times, Oct. 16, 1996, at A9.

The San in Botswana are being pressured by the government to leave the game reserve they call home and become more "civilized" by integrating into the national population. "How can you have a Stone Age creature continue to exist in the age of computers? . . . If the Bushmen want to survive, they must change or otherwise like the dodo, they will perish," declared Festus G. Mogae, Botswana's Vice President. Suzanne Daley, *Botswana is Pressing Bushmen to Leave Reserve*, N.Y. Times, July 14, 1996, at A3. Demonstrating the complexity of the issues, although the living conditions of the San on the reserve are deplorable, neither they, their friends, nor their enemies are quite sure what direction their future should take — remaining on the reserve and preserving the status quo, or leaving the reserve and conforming to the conventions of life in the 21st century. See *id.*

13. See, e.g., Son, *supra* note 11; see also Chatterjee, *supra* note 3 (describing the effects of large-scale mining activities on indigenous lands worldwide).

14. See, e.g., *Philippines' Tribes Fear Being Displaced by Reforestation*, *Agence France-Presse*, Mar. 10, 1995, *available in* 1995 WL 7775383.

15. See John Vidal, *Forests for Life: Livelihood: The Dispossessed*, *The Observer*, Sept. 29, 1996, *The Observer Supplement Page*, *available in* 1996 WL 12395917.

communities.<sup>16</sup> Illegal miners in Brazil continue to invade Indian lands, with detrimental consequences for the tribes and the environment.<sup>17</sup> The Philippines has passed legislation to encourage more mining by outsiders on the lands of its indigenous peoples, endangering the ability of indigenous communities to protect their way of life.<sup>18</sup> The population pressures in Brazil increase the number of illegal miners who invade indigenous land.<sup>19</sup> In the Philippines, population pressure is directed toward conversion of tribal ancestral domains into agricultural lands.<sup>20</sup>

Throughout their history, the United States and Australia have also faced these issues.<sup>21</sup> This Article argues that developing countries, such as Brazil and the Philippines, facing conflict between protection of the land rights<sup>22</sup> of their indigenous populations and the demands of economic development<sup>23</sup> can learn from the experiences of the United States and Australia.<sup>24</sup> The

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16. See Vidal, *supra* note 15; see also Fred Pearce, *Forests for Life: The Amazon: Slash, Burn and Start Again*, *The Observer*, Sept. 29, 1996, *The Observer Supplement Page*, available in 1996 WL 12395921.

17. For example, in the first six months of 1996, health workers recorded 1755 cases of malaria and an increase in tuberculosis among the Yanomami. See Laurie Goering, *Lust for Gold Imperils Indians*, *Fort Worth Star-Telegram*, Sept. 8, 1996, available in 1996 WL 11337929. Before the miners' invasion, the diseases were unknown to the tribe. See *id.*

18. See Jon Liden, *Swallowing Criticism: Miners in the Philippines Pursue a Greener Image*, *Asian Wall St. J.*, May 2, 1996, available in 1996 WL-WSJA 10212527.

19. See Uncas Fernandez, *Brewing Land Conflicts Could Worsen in Brazil*, *Agence France-Presse*, Sept. 2, 1996, available in 1996 WL 3916480.

20. See Pratap Chatterjee, *Philippines: Indigenous People Occupy Dole Pineapple Plantation*, *Inter Press Service*, Feb. 16, 1996, available in 1996 WL 7881613.

21. Canada and New Zealand are other developed countries with significant and active indigenous populations whose status and condition are still unsettled.

22. Fundamentally, "indigenous land rights" means the right of indigenous people to choose to survive as a distinct people. It means the recognition, in accordance with international human rights and indigenous rights norms, of the right and ability of indigenous peoples to own, possess, and control the future of their traditional lands. This Article accepts indigenous rights to land as evidenced in customary international law, international conventions, and the constitutions of many developing nations. The analysis is restricted to the exploration of practical steps which can lead to *meaningful* recognition of these rights.

23. Ideally, economic development would benefit the entire population of a country. The United Nations Declaration on the Right to Development in Article 2, Section 3 states that "States have the right and *duty* to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population of all individuals . . ." G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986) (emphasis added) [hereinafter Declaration on the Right to Development].

24. The United States, Australia, the Philippines, and Brazil have a shared legacy of colonization. Land ownership patterns in Brazil and the Philippines are representative of the legacy of colonial influences on the ownership of land in developing countries. See *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies* (Jaap de Moor

United States has a rich history of legal recognition of indigenous rights to land.<sup>25</sup> Australia has attempted to rectify the 200-year old legal dispossession of its native peoples.<sup>26</sup> As such, their experiences offer examples of legislative strategies for the protection of indigenous land rights, while illuminating indigenous land rights principles that can be adopted in developing countries.

Standing alone, the general human rights documents promulgated by the United Nations and its agencies do not address the special situation and concerns facing indigenous peoples in their interactions with state governments. A more focused approach is needed to resolve the demands of indigenous people for autonomy and viable self-perpetuation with the push toward the large scale development of natural resources.<sup>27</sup> Nevertheless, both the general human rights documents and documents specifically addressing indigenous rights provide evidence of emerging international normative standards regarding the treatment of indigenous peoples. Together with the experiences of the United States and Australia, these documents form the basis for the formulation of fundamental criteria that must be fulfilled in order to assure the protection of indigenous rights.

Part II examines the land rights of the world's indigenous peoples under various international declarations and conventions of the United Nations and its agencies. Part III traces the evolution of United States and Australian policies toward the land rights of their indigenous populations. Part IV summarizes the current status of indigenous land rights in Brazil and the Philippines and the rights and protections guaranteed to indigenous people under their constitutions. In Part V, the Author proposes the following Four Criteria for adoption by Brazil and the Philippines: the commitment of state parties, institution of land claims procedures,

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& Kietmar Rothermund eds., 1994).

25. See *infra* Part III.A. That such legal recognition was accompanied by neither practical recognition nor legal protection is not explored in detail in this Article. This Article neither praises nor criticizes the United States or Australia for their histories of interactions with their indigenous populations. For more on this subject, see, e.g., Marc Gumbert, *Neither Justice Nor Reason* (1984); Dee Brown, *Bury My Heart at Wounded Knee* (1970). The central purpose here is to extract from their histories principles, policies, or doctrines (either reflecting those histories or in opposition to them) that can be used to improve the futures of indigenous peoples in developing countries.

26. See *infra* Part III.B.

27. See Laura Stomski, *The Development of Minimum Standards for the Protection and Promotion of Rights for Indigenous People*, 16 *Am. Indian L. Rev.* 575, 578 (1991).

secure titles to land, and the control of and participation in development projects by indigenous peoples. These criteria are intended to balance successfully economic development and indigenous rights.

## II. INDIGENOUS LAND RIGHTS UNDER INTERNATIONAL LAW

Under the international legal system, states are obligated to protect and promote the rights of their indigenous citizens.<sup>28</sup> United Nations documents provide a basis for understanding those obligations and contextualizing the demands of indigenous groups within the parameters of international norms and expectations.<sup>29</sup> Traditional human rights documents usually posit the *individual* as the rights bearer;<sup>30</sup> in contrast, indigenous communities are concerned with *collective* rights that will protect their ability to continue their existence as a "separate" people.<sup>31</sup>

Despite this focus on individual rights, the general human rights instruments adopted by the United Nations General Assembly carry the basic seeds for the recognition and security of land rights and the right of participation of indigenous communities in development projects.

### A. PROTECTION OF INDIGENOUS RIGHTS

The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries<sup>32</sup> and the Draft Declaration on the Rights of Indigenous Peoples<sup>33</sup> fully recognize the goals of indigenous peoples. First, both documents affirm the right of indigenous

28. See, e.g., The International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter *International Covenant on Economic, Social and Cultural Rights*]; see also The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 28 I.L.M. 1382 (1989) [hereinafter *Convention 169*].

29. This survey will focus on indigenous rights to land.

30. See, e.g., Stomski, *supra* note 27, at 578.

31. See *id.*; see also Barsh, *supra* note 6, at 33, 43-45.

32. See *Convention 169*, *supra* note 28. Although specifically directed toward the rights of indigenous peoples, Article 1, ¶ 3 of *Convention 169* expressly withholds from indigenous "peoples" the rights that would attach to them under international law: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." *Id.*

33. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/1995/2 (1994) [hereinafter *Draft Declaration*].

peoples to participate in and control development activities that affect them. For example, Article 7 of Convention 169 expressly recognizes the right of indigenous peoples to control and participate in the development process, especially as it affects their lives, beliefs, and lands.<sup>34</sup> Article 30 of the Draft Declaration mandates the informed consent of, and consultation with, indigenous peoples before development projects that affect their lives and territories are undertaken.<sup>35</sup> Convention 169 also confers on indigenous people control of their economic, social, and cultural development. Governments are urged to, among other things, make the living standards of indigenous peoples affected by development projects a priority, to implement studies in connection with development projects, and to protect the environments of indigenous peoples.<sup>36</sup>

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34. See Convention 169, *supra* note 28, at art. 7.

The peoples concerned shall have the *right to decide their own priorities for the process of development* as it affects their lives, beliefs, institutions and spiritual well-being and *the lands they occupy or otherwise use*, and to *exercise control, to the extent possible, over their own economic, social and cultural development*. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

*Id.* ¶ 1 (emphasis added). Note that, even here, indigenous *ownership* of the land is not acknowledged and control over the development process is limited by the clause "to the extent possible." *Id.*

35. See Draft Declaration, *supra* note 33, at art. 30.

*Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources*, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

*Id.* (emphasis added).

36. See Convention 169, *supra* note 28, at art. 7.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.



Governments must also ensure compensation when land rights or resources are infringed or relocation is necessary.<sup>37</sup>

Second, Convention 169 and the Draft Declaration both affirm the importance to indigenous peoples of the right to own, use, and occupy their ancestral lands. Part II of Convention 169 expressly addresses the issues attendant to indigenous land rights, such as demands for the recognition by governments of the special importance of indigenous relationships to land and territory,<sup>38</sup> the recognition of the state's obligation to identify and protect ownership and possession of land that is occupied or used for other traditional purposes by indigenous peoples,<sup>39</sup> and the duty to institute indigenous land claims procedures in the domestic legal systems of the nations concerned.<sup>40</sup> Convention 169 further

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4. Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Id. ¶¶ 2-4.

37. See, e.g., id. at art. 15, ¶ 2, which provides that:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Art. 16, ¶ 2 of Convention 169, *supra* note 28, further provides that "[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent."

38. See Convention 169, *supra* note 28, at art. 13.

In applying the provisions of this Part of the Convention *governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.*

Id. ¶ 1 (emphasis added).

39. See Convention 169, *supra* note 28, at art. 14.

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Id. ¶ 1 (emphasis added). This would encompass land which is used for traditional activities such as hunting and gathering; see also Draft Declaration, *supra* note 33, at art. 26.

40. See Convention 169, *supra* note 28, at art. 14.

provides for the protection of indigenous peoples from outsiders who might take advantage of indigenous customs to cheat indigenous people out of their land<sup>41</sup> and recommends the imposition of penalties for unauthorized intrusion on indigenous territory.<sup>42</sup>

Part VI of the Draft Declaration, recognizes in indigenous peoples the following land rights: (a) to maintain and strengthen their spiritual and material relationship not only with their lands, but also with seas and other coastal territories that they have traditionally used;<sup>43</sup> (b) to own and control their lands and territories and ensure recognition of their land tenure and other laws and customs;<sup>44</sup> and (c) to receive restitution or compensation — preferably replacement land — for traditional lands that are confiscated or taken away without their consent.<sup>45</sup> Part VI of the

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2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Id. ¶ 2-3.

41. See Convention 169, *supra* note 28, at art. 17, ¶ 3 ("Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.")

42. See Convention 169, *supra* note 28, at art. 18 ("Adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offenses.")

43. See Draft Declaration, *supra* note 33, at art. 25 ("Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.")

44. See Draft Declaration, *supra* note 33, at art. 26.

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Id.

45. Draft Declaration, *supra* note 33, at art. 27.

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned,

Draft Declaration also addresses environmental protection issues and confers on indigenous people the right to protect, restore, and conserve their environment, lands, territories, and resources.<sup>46</sup>

The institution of land claims procedures, secure titles to land, and the control of and participation in development projects by indigenous peoples, three of the four criteria recommended by the Author and elaborated in Part V are fully expressed in the Draft Declaration.<sup>47</sup> In sum, the emerging norms regarding indigenous land evidenced in international documents affirm the rights of indigenous peoples to their traditional lands and the need for compensation when these lands are encroached upon or confiscated.

## B. GENERAL INTERNATIONAL HUMAN RIGHTS PROTECTIONS

In addition to the international documents which specifically focus on and protect indigenous rights, the general human rights documents of the United Nations grant broad human rights protection to the world population.<sup>48</sup> For example, they prescribe equality before the law and equal protection under the law for all,<sup>49</sup> as well as individual standing to sue for violations of fundamental

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compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Id.

46. Draft Declaration, *supra* note 33, at art. 28 ("Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation.").

47. The most fundamental criterion, the commitment of the state, may be implicit in the document. The rights expressed in Articles 26 through 30 of the Draft Declaration require the active participation of the states within whose borders indigenous peoples are located. See, e.g., *supra* notes 44, 46.

48. The following general human rights United Nations documents were consulted for this Article: Universal Declaration of Human Rights, G.A. Res. 217A(111), 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948) (hereinafter Universal Declaration); International Covenant on Economic, Social and Cultural Rights, *supra* note 28; Declaration on the Right to Development, *supra* note 23.

49. See, e.g., Universal Declaration, *supra* note 48, at art. 7 ("*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*" (emphasis added)); International Covenant on Economic, Social, and Cultural Rights, *supra* note 28, at part II, art. 3 ("The States Parties to the present Covenant undertake to ensure the *equal right* of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." (emphasis added)).

rights.<sup>50</sup> Unfortunately, however, because seminal human rights conventions, such as the International Covenant on Economic, Social and Cultural Rights, recognize the rights of "peoples,"<sup>51</sup> governments are reluctant to designate indigenous peoples as "peoples." It is feared that this use of the word "peoples" would be an implicit recognition of such rights in indigenous peoples,<sup>52</sup> which would make governments responsible for the protection of those rights because the documents impose positive duties on states that are party to the conventions to take active measures to promote and protect those rights.<sup>53</sup>

Many other rights are accorded to "peoples" by these documents. For example, general human rights documents recognize the right of peoples to self-determination<sup>54</sup> and to exercise full

50. See, e.g., Universal Declaration, *supra* note 48, at art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

51. For example, the Covenant recognizes that "[a]ll peoples have the right of self-determination." International Covenant on Economic, Social and Cultural Rights, *supra* note 28, at part I, art. 1, ¶ 1.

52. See Barsh, *supra* note 6, at 49-50 (arguing that the fear of the consequences of demands for self-determination underlie the reluctance of nations to add the "s" to the International Year of the World's Indigenous Peoples). See Davis, *supra* note 4, for a description of the semantic battle fought over the designation of indigenous groups as "people" or "peoples."

53. See International Covenant on Economic, Social, and Cultural Rights, *supra* note 28, at part II.

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* at arts. 1-2; Declaration on the Right to Development, *supra* note 23, at art. 2.

3. States have the *right* and the *duty* to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

*Id.* ¶ 3 (emphasis added).

54. See, e.g., International Covenant on Economic, Social, and Cultural Rights, *supra* note 28, at part I ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); Declaration on the Right to Development, *supra* note 23, at art. 1, ¶ 2 ("The human right to development also implies the *full realization of the right of peoples*

sovereignty over, and freely dispose of, their natural wealth and resources.<sup>55</sup> In addition, the right to own property and to be protected against arbitrary deprivation of property is also enunciated in the documents.<sup>56</sup>

The general human rights documents of the United Nations do not adequately address the special concerns of indigenous communities.<sup>57</sup> First, the general documents do not offer a resolution of the conflicts between indigenous peoples' demands for autonomy and preservation of their traditional lifestyles and the pressures toward large scale exploitation of natural resources.<sup>58</sup> Not only do indigenous people not fall under the definition of "peoples" used in the documents,<sup>59</sup> but the realities of their situation cause them to fall outside the purview of the provisions. For example, although the Universal Declaration recognizes the right to own property and the right against arbitrary deprivation of such property, this right confers no protection where municipal law does not recognize land inhabited by indigenous people as their property.<sup>60</sup>

Second, the documents that do specifically address the unique situation of indigenous peoples, although wide-ranging in their rhetorical scope, have, as in the case of Convention 169, been ratified by only a few countries.<sup>61</sup> Moreover, the Draft Declaration is but

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to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." (emphasis added)).

55. See, e.g., International Covenant on Economic, Social, and Cultural Rights, *supra* note 28, at part I.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

*Id.* ¶ 2.

56. See, e.g., Universal Declaration, *supra* note 48, at art. 17 ("Everyone has the right to own property alone as well as in association with others. . . . No one shall be arbitrarily deprived of his property.").

57. In addition, international human rights norms, although popularly supported in the General Assembly and other public fora, are, in reality, not ardently practiced in many countries. See, e.g., Annual Human Rights Report, U.S. Department of State Dispatch, Feb. 11, 1991, available in 1991 WL 2847739.

58. See, e.g., Stomski, *supra* note 27, at 578.

59. See *supra* notes 32, 52.

60. See *infra* note 160 and accompanying text regarding the Philippine Regalian doctrine.

61. Only Bolivia, Colombia, Costa Rica, Denmark, Guatemala, Honduras, Mexico, Norway, Paraguay, and Peru have ratified the Convention. See M.J. Bowman & D.J. Harris, *Multilateral Treaties, Index and Current Status* 81 (1995); International Labour Organiza-

a draft; it may be years before it works its way through the Economic and Social Council and is addressed by the U.N. General Assembly.

However, despite this disparity between aspiration and reality, some scholars argue that new indigenous human rights norms have emerged<sup>62</sup> or even that such norms have always existed at law, although they have been disregarded in practice.<sup>63</sup> If the indigenous peoples of Brazil and the Philippines are to enjoy meaningful recognition and protection of their rights, their governments must incorporate these norms in their laws and policies.

### III. THE EXPERIENCES OF THE UNITED STATES AND AUSTRALIA

The United States and Australia are two of the world's wealthiest nations. Their dealings with the indigenous populations of their national territories and the development of policies and laws affecting those populations have been an integral part of their respective histories. It is a history that reverberates into the present: Developing countries, such as Brazil and the Philippines, can learn a tremendous amount from the American and Australian experiences in this area.

#### A. THE UNITED STATES

*This is my land  
From the time of the first moon  
Till the time of the last sun  
It was given to my people.<sup>64</sup>*

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tion, ILOLEX (visited May 8, 1997) <<http://ilolex.ilo.ch:1567/public/50normes/ilolex/sqcgi/query>>.

62. See generally Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 *Yale J. Int'l L.* 127, 145, 155-64 (1991); see also Barsh, *supra* note 6, at 75. Barsh argues that the non-binding nature of the international documents is not very significant as the weapons of choice today are publicity and censure. See *id.* Indeed, the demarcation of Yanomami lands in Brazil took place shortly before the Rio Earth Summit of 1993; elsewhere companies have become increasingly conscientious in consulting with indigenous peoples before initiating disruptive development projects. See generally Rodgers, *supra* note 3.

63. See, e.g., Julie Cassidy, *The Enforcement of Aboriginal Rights in Customary International Law*, 4 *Ind. Int'l & Comp. L. Rev.* 59 (1993).

64. American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* iii (1975) (quoting Clarence Pickernell).

### 1. *The Legal Status of Native Americans*

Official treatment of the indigenous Native American tribes in the United States has devolved from the early legal recognition of their sovereignty to the present regime, which acknowledges limited sovereignty and the right to self-determination. During the more than two centuries of United States history, official action and policy toward indigenous peoples has included dispossession of native tribes through conquest and treaty,<sup>65</sup> development of a guardian-ward relationship between the federal government and the tribes,<sup>66</sup> and attempts at assimilation and compensation.<sup>67</sup>

The historical evidence makes clear that in the early days of settlement, colonization, and independence, England and the United States regarded the Native American tribes as independent nations.<sup>68</sup> This recognition is evidenced by the acknowledgment of aboriginal title, both in case law and statutes, as well as by the acceptance of independent sources of jurisdiction in Indian territory.<sup>69</sup>

First, that the United States Constitution has a specific Indian Commerce Clause,<sup>70</sup> and that it fails to otherwise mention Native Americans except to omit them from the Census if they did not pay taxes,<sup>71</sup> point to the fact that the tribes were initially viewed as

65. See, e.g., Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 Kan. L. Rev. 713, 718–25 (1986). One scholar estimates that at the time of Columbus's discovery, 900,000 to 1,000,000 Native Americans inhabited the continental territories that were to become the United States. See Henry C. Dennis, *The American Indian 1492-1976* xiii (2d ed. 1977).

66. See *infra* note 85.

67. Both the Indian Claims Commission and the Allotment Acts were attempts to assimilate the tribes into American society. See *infra* notes 99–100, 299 and accompanying text; see also Getches, *supra* note 9, at 168–214.

68. See, e.g., Institute for the Development of Indian Law, *A History of Indian Jurisdiction*, 2 Am. Indian J. 2 (1976).

69. See generally Harry B. Wallace, Note, *Indian Sovereignty and Eastern Indian Land Claims*, 27 N.Y.L. Sch. L. Rev. 921 (1982).

70. See U.S. Const., art. 1, § 8, cl. 3 ("The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.").

71. See U.S. Const., art. 1, § 2, cl. 3. In fact, Native Americans did not become citizens of the United States until 1924, more than 50 years after the Civil War brought an end to slavery and the Fourteenth Amendment made the ex-slaves citizens. See Citizenship Act of June 2, 1924, 8 U.S.C. § 1401(b) (1994). Before the passage of the Act, Congress selectively extended citizenship to some Native Americans by treaty and statute. See Getches, *supra* note 9, at 738–39.

foreign nations. Native Americans were not a part of the body politic of the United States. As a result, no constitutional provisions directly address indigenous land or any other indigenous rights.<sup>72</sup>

Second, the Northwest Ordinance of July 13, 1787 stated that

[t]he utmost good faith shall always be observed towards the Indians; *their land and property* shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress

....<sup>73</sup>

Third, the Trade and Intercourse Act of 1790<sup>74</sup> made clear that only the federal government could authorize trade with the Native American Nations<sup>75</sup> and, in the absence of federal approval, states and private individuals could not affect the property rights of the tribes.<sup>76</sup> The acquisition of Native American lands and trade goods, therefore, was a government-to-government transaction, a relationship between sovereign equals.<sup>77</sup>

Finally, the *de jure* treatment of Native American land rights owed much to the writings of seminal international legal scholars such as Francisco de Vittoria, who repudiated the notion that "dis-

72. Tribal governments were traditionally not subject to the United States Constitution. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896). Almost two hundred years after the Constitutional Convention, the Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1302 made most of the provisions of the Bill of Rights applicable to Native Americans in their individual capacity. See Getches, *supra* note 9, at 499-503.

73. Northwest Ordinance of July 13, 1787 (adopted as amended ch. 8, 1 Stat. 50), art. 3, reprinted in Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 41 (1947) (emphasis added).

74. Ch. 33, 1 Stat. 137 (1790) [hereinafter Trade and Intercourse Act]. Congress passed a series of such acts until 1834. See, e.g., Ch. 161, 4 Stat. 729 (1834).

75. Trade and Intercourse Act, *supra* note 74, § 1 (1790) ("[N]o person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license of that purpose under the hand and seal of . . . such . . . person as the President of the United States shall appoint for that purpose . . .").

76. Trade and Intercourse Act, *supra* note 74, § 4.

[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, *held under the authority of the United States*.

*Id.* (emphasis added).

77. See, e.g., Angela R. Hoeft, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 Law & Ineq. 203, 209-12 (1995).



covery" conferred ownership of the New World on its European "discoverers."<sup>78</sup> Chief Justice Marshall's opinion in *Johnson v. M'Intosh*,<sup>79</sup> demonstrates the acceptance of de Vittoria's theories. According to Marshall, the discovery doctrine spoke of the rights of acquisition of European nations with respect to each other.<sup>80</sup> The only abrogation of Native American sovereignty or property rights was the lack of choice about the European nation with which they would associate — they were restricted to the nation that had successfully asserted discovery rights.<sup>81</sup> However, the tribes' use and occupancy rights were recognized.<sup>82</sup>

However, as the United States grew in strength, legislation and case law slowly evolved to reflect the fact that Native Americans were being conquered and subjugated.<sup>83</sup> The Marshall Court changed the foreign nation status of Native American tribes when it demoted them to "domestic dependent nation[s]"<sup>84</sup> and defined the tribes' relationship with the United States government as that of wards and guardian.<sup>85</sup> By 1886, when the Court formally ruled on the relationship between Native Americans and the federal

78. A sixteenth century Dominican priest, Francisco de Vittoria (1480–1546) has also had a profound impact on the legal treatment of indigenous peoples in international law through his lectures on Indian rights. See Getches, *supra* note 9, at 50; see also Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1, 11–17 (1942).

79. 21 U.S. (8 Wheat.) 543 (1823).

80. *Id.* at 573 ("This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives.").

81. See *id.*; see also Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481, 493 (1994).

82. "They [the original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . ." 21 U.S. at 574. The colonists' recognition of the military might of the tribes vis-a-vis their own tenuous position as colonists far from their native shores also mandated such treatment. See Felix S. Cohen, *Handbook of Federal Indian Law* 55 (1982).

83. See generally Institute for the Development of Indian Law, *supra* note 68, for an account of the gradual whittling away of Indian jurisdictional power and sovereignty.

84. *The Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*." (emphasis added)).

85. See *id.* ("[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); see also *Ex Parte Webb*, 225 U.S. 663, 684 (1912) ("Although these tribes had long been treated more liberally than other Indians, they remained none the less wards of the Government, and in all respects subject to its control.").

government in *United States v. Kagama*,<sup>86</sup> there had been several military actions against the tribes,<sup>87</sup> and their land holdings had been significantly reduced.<sup>88</sup> In addition, the Indian Removal Act<sup>89</sup> had been enacted and the formal termination of treaty-making with the Native American tribes had taken place.<sup>90</sup> Although the tribes' sovereignty was not in dispute, the United States no longer treated the tribes as nations with equal status. The guardian-ward relationship was now a *source of*, rather than a *restraint on*, federal power.<sup>91</sup>

However, the recognition of tribal sovereignty and the plenary jurisdiction of the federal government<sup>92</sup> has meant that, although their land may lie within state borders, the jurisdictional power of the states over Native American Territory is limited.<sup>93</sup>

## 2. Native American Land

Although legal recognition of Native American tribes as equal independent nations did not last long, and even as the United States waged war against the tribes, the United States continued to recognize Native American title in lands and attempted to

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86. 118 U.S. 375 (1886) (affirming Congress's power to assert criminal jurisdiction over Native Americans in their territories).

87. See Lee Francis, *Native Time: A Historical Time Line of Native America 164-232* (1996), for a chronological account of the military actions fought and the treaties entered into by the United States and Native American tribes between 1776 and 1886.

88. By 1871, the United States had gained control of 99% of Native American land. See *id.* at 164.

89. Ch. 148, 4 Stat. 412 (1830) (codified as amended at 25 U.S.C. §174 (1994)). The Cherokee, Choctaw, Creek, Chickasaw, and Seminole tribes (the "five civilized tribes") of the Southeast were removed from their traditional territories in Mississippi, Georgia, and other Southeastern states to Indian Country west of the Mississippi. See D'arcy McNickle, *They Came Here First 199-200* (rev. ed. 1975), reprinted in Getches, *supra* note 9, at 153.

90. See Indian Department Appropriations Act of 1871 (Termination of Treaty Making Process), codified at 25 U.S.C. § 71 (1994).

91. See, e.g., *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913) ("[I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes . . . are to be determined by Congress, and not by the courts.").

92. See Wallace, *supra* note 69, at 923-25. Congress's plenary power over Native Americans includes the power to abrogate treaties with the tribes. See generally Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth" — How Long a Time is That?*, 63 Cal. L. Rev. 601 (1975). The courts limited this power by using canons of statutory interpretation favorable to Native Americans. See *id.* at 623-45.

93. See Getches, *supra* note 9, at 5.

compensate the tribes either financially or through replacement lands when tribal lands were taken away.<sup>94</sup> However, while the intent to compensate may seem beneficent at first glance, compensation was not always offered, and in fact, the promise to compensate was used as a means of acquiring approximately half of the territories that make up the continental United States.<sup>95</sup>

The legal recognition of Native American rights to their land has meant that the tribes' claims have been entertained in United States courts. However, shortly after the Court of Claims was created in 1855,<sup>96</sup> claims by Native Americans were barred by further legislation.<sup>97</sup> Nevertheless, well-organized and shrewd tribes were able to lobby Congress for the right to sue for restitution and compensation, which was accomplished through special jurisdictional acts passed by the Congress.<sup>98</sup>

In 1946, the Indian Claims Commission<sup>99</sup> was created. The Commission, it was hoped, would finally extinguish Native American claims against the federal government.<sup>100</sup> This attempt failed. When the Commission was terminated in 1978, its remaining docket was assumed by the Court of Claims.<sup>101</sup> In 1990, Native American land claims that had been filed with the Indian Claims Commission still remained in the Court of Claims.<sup>102</sup> Unlike title recognized in treaty and agreement documents, original Indian title (or aboriginal title)<sup>103</sup> was not compensable under the

94. See Singer, *supra* note 81, at 526. A well-known example is the removal of the five civilized tribes. See McNickle, *supra* note 89.

95. See Russell Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. Rev. 1-2, 7 (1982).

96. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (current version at 28 U.S.C. §§ 2501-22 (1994)).

97. Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767.

98. See Nell Jessup Newton, *Compensation, Reparations & Restitution: Indian Property Claims in the United States*, 28 Ga. L. Rev. 453, 467 (1994).

99. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, ch. 959, 60 Stat. 1049 (formerly codified at 25 U.S.C. § 70 until omitted from the Code upon the termination of the Commission on Sept. 30, 1978).

100. See Getches, *supra* note 9, at 311; see also Barsh, *supra* note 95, at 11-16. According to Barsh, the Congressional intent actuating the settlement process was "the extinction of Indian's [sic] surviving special legal rights as Indians." *Id.* at 7.

101. See Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753, 774 (1992).

102. See *id.* at 775.

103. "Original" or "Indian" title is the right of occupancy and use which is retained by the tribes after the discovery of their lands by the European nations. It is a legal right, enforceable against third parties, that only the discovering sovereign nation can extinguish,

Fifth Amendment takings clause.<sup>104</sup> However, a taking of original title could form the basis of a claim under the Indian Claims Commission Act, providing the tribes the opportunity to win compensation for lands, their ownership of which had not been officially recognized by the United States.

From the time of the American Revolution until 1900, the United States gained possession of over two billion acres of land owned by indigenous tribes on the North American continent.<sup>105</sup> Much of it was acquired with little or no compensation.<sup>106</sup> Apart from the failed effort of the Indian Claims Commission (which, in any event, gave only monetary compensation), no coordinated effort has been made to address the land claims of Native Americans.<sup>107</sup> Claims continue to be made in both federal and state courts.<sup>108</sup>

In sum, the United States legal regime has always recognized Native American sovereignty. The legal perception of the nature of that sovereignty, however, has changed over time, adapting to the realities of conquest and subjugation and the increasing strength — in numbers and military might — of the European newcomers. The attempts by both the legislatures and the courts to reconcile conflicting legal theories regarding the status of American indigenous tribes, to define that status, and to recognize tribal rights and sovereignty while still fostering the economic and

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through purchase or conquest. See Getches, *supra* note 9, at 79, 300. Recognized title is title to Indian lands that has been recognized by treaty or federal statute. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 212, 277–78 (1955) (“The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.” (footnote omitted)).

104. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). By removing the legal duty (to respect — and pay compensation for — original Indian title), the Court’s ruling paved the way for Congress to pass the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601–29, which extinguished all original Indian title in Native Alaskans, vesting them instead with ownership in village corporations and 44 million of the 335 million acre Alaska territory.

105. See Barsh, *supra* note 95, at 1.

106. See *id.*

107. See *id.*

108. See, e.g., *Alabama-Coushatta Tribe of Texas v. United States*, Cong. Ref. No. 3-83, 1996 WL 409086 (Fed. Cl. July 22, 1996) (finding that, in failing to protect the tribe in its occupancy of its original lands, the U.S. government breached its fiduciary duty to the tribe). The tribe is claiming 6,388,685 acres in 12 Texas counties. *Id.* at \*1. Further proceedings are scheduled to determine the amount of damages due. *Id.* at \*80.

political expansion of the United States, provide many lessons that can be adapted by developing countries.

## B. AUSTRALIA

*That tree, grass . . . that all like our father.  
Dirt, earth, I sleep with this earth.  
Grass . . . just like your brother.  
In my blood in my arm this grass.*<sup>109</sup>

### 1. *The Legal Status of Australian Aborigines*

Unlike the land title of the Native Americans of the United States, the aboriginal land title of the Aborigines of Australia was not recognized in Australian law until recently. On arriving in Australia in 1788, Captain Cook claimed sovereignty of the territory in the name of Britain. Cook declared that Australia was *terra nullius* (land belonging to no one).<sup>110</sup> However, there is some evidence that, after Cook's initial determination, the colonial officials and those in the Colonial Office tacitly acknowledged that this assessment was erroneous and that the indigenous peoples had rights to the land.<sup>111</sup>

The effects of Cook's determination were devastating to the Aborigines. First, due to Australia's designation as *terra nullius* and despite campaigns for land rights and compensation by Christian

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109. Bill Neidjie, *Story About Feeling 4* (Keith Taylor ed., 1989).

110. *Terra nullius* is a doctrine in international law that essentially extinguished the title of original inhabitants based on subjective assessments of their level of civilization. See Castles, *infra* note 114, at 63. The term has two meanings, usually conflated: "a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all, where no tenure of any sort existed." Reynolds, *infra* note 114, at 12. Legal scholars used the Eurocentric doctrine to justify colonization by European countries. *Id.*

111. The Letters Patent, which established the boundaries of South Australia, contained important reservation clauses tacitly acknowledging the Aborigines' right of occupation:

[N]othing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal inhabitants of the said colony . . . to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.

S. Austl. Stat. Vol. II, 749, reprinted in Julie Cassidy, *The Enforcement of Aboriginal Rights in Customary International Law*, 4 Ind. Int'l & Comp. L. Rev. 59, 66 (1993); see also Julie Cassidy, *A Reappraisal of Aboriginal Policy in Colonial Australia: Imperial and Colonial Instruments and Legislation Recognizing the Special Rights and Status of Australian Aborigines*, 10 J. Legal Hist. 365 (1989).

philanthropists, anti-slavery societies, and the Aboriginal Protection Society,<sup>112</sup> no treaties were signed with the indigenous Aborigines<sup>113</sup> and no compensation was paid to them. This is significant because at the time of Australia's discovery, the usual practice of a colonizing force was to negotiate agreements with the original inhabitants.<sup>114</sup>

Second, Australia received English law in 1828,<sup>115</sup> and *terra nullius*, including the principle of the Crown as the proprietor of all land, remained the basis of the Australian property system.<sup>116</sup> As the Crown did not grant any land to the Aborigines, they were never vested with title to their land.<sup>117</sup> As a result, the Aborigines of Australia were, at law, completely dispossessed of their land without compensation, a fate shared by no other people colonized by Great Britain.<sup>118</sup>

Aside from the fact that the Australian Aborigines had no legal title to their land, the lack of legal recognition in any form virtually destroyed Aboriginal culture. It is estimated that before European incursion in 1788, the Aboriginal population numbered about 300,000, divided into 600 linguistic groupings.<sup>119</sup> Despite reservations in the Letters Patent,<sup>120</sup> in some land grants,<sup>121</sup>

112. See Cassidy, *A Reappraisal of Aboriginal Policy*, supra note 111, at 367; see also Ruth S. Kerr, *Aboriginal Land Rights: A Comparative Assessment* 5 (1991).

113. See Marc Gumbert, *Neither Justice Nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights* 27 (1984).

114. See Henry Reynolds, *The Law of the Land* 173 (1987). In fact, Cook's instructions from the British Admiralty specifically directed him to do so:

You are likewise to observe the genius, temper, disposition and number of the natives, if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them . . . inviting them to traffick, and shewing them every kind of civility and regard. . . . You are also with the consent of the natives to take possession of convenient situations in the country . . . or, if you find the country uninhabited take possession for His Majesty.

Alex C. Castles, *An Australian Legal History* 253-54 (1982), reprinted in H. McRae et al., *Aboriginal Legal Issues, Commentary and Materials* 10 (1991).

115. See Kerr, supra note 112, at 8.

116. See Reynolds, supra note 114, at 173.

117. See Kerr, supra note 112, at 9.

118. See McRae et al., supra note 114, at 101.

119. See Gumbert, supra note 113, at 10.

120. See 2 S. Austl. Stat. 749, reprinted in Cassidy, supra note 111, at 66.

121. See, e.g., *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141, 260.

Reserving nevertheless and excepting out of the said demise to Her Majesty . . . for and on account of the present Aboriginal Inhabitants of the Province and their descendants . . . full and free right of ingress, egress and regress into upon and over the said Waste Lands of the Crown . . . and in and to the Springs and surface

and in the instructions of the Crown to Arthur Phillip, the first governor,<sup>122</sup> of Aboriginal rights to use and possess their land, the settlers in the field regarded the Aborigine as a pest to be exterminated.<sup>123</sup> The tribes attempted to defend their territories, but their sporadic guerilla-type resistance against the white invaders was severely punished.<sup>124</sup> By 1900, seventy-five percent of the population was thought to have been killed either by violent attacks by the settlers or by infectious diseases those settlers brought with them.<sup>125</sup>

As the decline in the population became evident, the Aborigines were herded into reservations or were forcibly employed as unpaid cattle workers on the pastoral properties that covered their ancestral lands.<sup>126</sup> The reserve areas usually were located in desolate regions unwanted by the European population.<sup>127</sup> There the Aborigines remained, for the most part, until their economic utility on pastoral properties declined and restrictive laws confining them to the reservations were gradually dissolved in the 1960s.<sup>128</sup>

Finally, until 1967, not only were Aborigines constitutionally excluded from the population census, but the power to legislate over their affairs was withheld from the Commonwealth

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water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to if this demise had not been made.

*Id.* (quoting an excerpt from a reserve provision in a pastoral lease).

122. See George Burnett Barton, "Philips Instructions" *History of New South Wales from the Records* Vol. 1, Gov. Phillip 483 (1889), reprinted in McRae et al., *supra* note 114, at 10.

You are to endeavour, by every possible means, to open an intercourse with the Natives and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects should wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offense.

*Id.*

123. See Robert Hughes, *The Fatal Shore* 277 (1987); see also *id.* at 93-95, 272-81 for an informative account of attitudes and policies toward the Aborigines by the early colonists.

124. See Gumbert, *supra* note 113, at 12; see also Janine P. Roberts, *Massacres to Mining* (1981), reprinted in McRae et al., *supra* note 114, at 15-17.

125. See Gumbert, *supra* note 113, at 12.

126. See McRae et al., *supra* note 114, at 147-48, 310.

127. See Gumbert, *supra* note 113, at 17; see also McRae et al., *supra* note 114, at 147.

128. See McRae et al., *supra* note 114, at 148. At the same time some communities in the more inaccessible areas retained their traditional lifestyles until well into the 20th century, in large part untroubled by the European presence. See *id.*

government.<sup>129</sup> In a 1967 constitutional referendum, ninety-two percent of Australians voted in favor of removing that discriminatory exclusion, effectively giving the Commonwealth government legislative power over the Aborigines.<sup>130</sup> As a result of that constitutional referendum, Commonwealth legislation over Aborigines supersedes that of the individual states.

## 2. *Aboriginal Land Rights after 1976*

Before the passage of the Commonwealth Aboriginal Land Rights (Northern Territory) Act, 1976<sup>131</sup> (the "Land Rights Act"), Aborigines had no constitutional, statutory, or common law right to own land.<sup>132</sup> The Land Rights Act gives Aborigines inalienable, statutory title to land that they can prove they had traditionally owned. Under the Land Rights Act, only land that is unalienated Crown land or that is owned by Aborigines can be the subject of a land claim.<sup>133</sup> All claims under the Land Rights Act must be filed by June 5, 1997.<sup>134</sup> The Land Rights Act is applicable only to the Northern Territory where the Commonwealth Parliament has full legislative power.<sup>135</sup> With the passage of the

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129. Australia is a federation, and the Commonwealth government is equivalent to the United States Federal Government. The Commonwealth has special, enumerated powers, while the power of the six states is general. See P. H. Lane, *An Introduction to the Australian Constitutions* 2 (6th ed. 1994).

130. See Gumbert, *supra* note 113, at 23.

131. *Aboriginal Land Rights (Northern Territory) Act, 1976* (Austl.).

132. See *McRae et al.*, *supra* note 117, at 101; see also *Millirpum v. Nabalco Pty Ltd. and Commonwealth* (1971) 17 F.L.R. 141 (holding that Australian law recognizes no title in Aboriginal occupation of land under traditional law). This unsuccessful attempt by the Aboriginal plaintiffs to gain legal recognition of their land ownership and the strikes by Aboriginal cattle workers against their appalling work conditions, combined with the social upheaval of the 1960s and 1970s, gave added impetus to the movement for Aboriginal land rights and resulted in the passage of the Land Rights Act in 1976. See *McRae et al.*, *supra* note 114, at 148. The Land Rights Act is applicable only to Australia's Northern Territory. Other legislation regarding indigenous rights to land have been passed in other states. See *id.* at 148-60 for an account and analysis of the land rights legislation promulgated in Australia's states in the past 30 years.

133. See § 50(1)(a) of the Land Rights Act; Gumbert, *supra* note 113, at 41. Where pastoral properties are in Aboriginal hands, the traditional owners of that land, if they are not the official owners of that land, can submit a land claim for that land. This, however, disadvantages the Aborigines who previously purchased the land. See *McRae et al.*, *supra* note 114, at 170.

134. See Land Rights Act § 50(2A) (the "sunset clause").

135. The Northern Territory is still not a state, but has some of the characteristics of self government. See Lane, *supra* note 129, at 115. Since it is not a state, the



Land Rights Act, Aboriginal reserve lands in the Northern Territory, constituting approximately eighteen percent of its area, were transferred to Aboriginal land trusts.<sup>136</sup> It is estimated that by the time the sunset clause for making claims comes into effect in 1997, forty-six percent of the Northern Territory may be transferred to Aboriginal claimants.<sup>137</sup>

Critics of the Land Rights Act point out that it disadvantages those Aborigines most severely affected by European colonization — town dwellers and pastoral communities.<sup>138</sup> Since the land to which they have traditional affiliations cannot be the subject of claims, they are unable to obtain official title to, or possession of, their traditional country. The Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act, 1989 (N.T.)<sup>139</sup> attempts to respond to this concern, allowing small excisions of land from the large pastoral properties that dominate landholding patterns in the Northern Territory.<sup>140</sup>

While the Land Rights Act did much to return Aboriginal land in the Northern Territory, its national impact pales in comparison to the 1992 landmark case *Mabo v. Queensland*,<sup>141</sup> which created a seismic upheaval in the legal landscape of Australia. In that case, the High Court of Australia ruled that aboriginal title *did* survive European settlement and continues to exist at common law, but is subject to the sovereignty of the Crown. On December 22, 1993, after a great deal of lobbying, posturing, and politicking,<sup>142</sup> the Native Title Act, 1993 was passed, applicable

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Commonwealth can pass general legislation applicable to it. See *id.* at 117.

136. See Gumbert, *supra* note 113, at 40, 41 n.18.

137. See McRae et al., *supra* note 114, at 150.

138. See Gumbert, *supra* note 113, at 41; see also McRae et al., *supra* note 114, at 145. "Town dwellers" are dispossessed Aborigines who live on the edge of white towns. Pastoral communities consist of the descendants of Aborigines who once worked on the Northern Territory's pastoral properties. Unable to claim their traditional land under the terms of the Land Rights Act, they live under conditions of abject poverty. See *id.* at 173-74.

139. The Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act, 1989 (Austl.).

140. The Australian government leases about 70% of the Northern Territory to pastoralists for lease terms of 30 to 99 years. Due to the aridity of the land, many of the properties are rather large. See McRae, *supra* note 114, at 170. This legislation has not been very successful in allowing indigenous peoples to live on their traditional land. See Jeff Stead, *The Aboriginal Land Rights Act (Northern Territory) 1976: Successes and Failures*, (1996) (unpublished manuscript, on file with the *Columbia Journal of Law and Social Problems*).

141. (1992) 107 A.L.R. 1.

142. See G.P.F. McGinley, *Natural Resource Companies and Aboriginal Title to Land: The Australian Experience — Mabo and Its Aftermath*, 28 Int'l L. 695, 714-15 (1994).

to all states, effective January 1, 1994.<sup>143</sup> The Native Title Act purported to regulate the native title found to exist at common law by the High Court and established procedures for making and adjudicating land claims.<sup>144</sup> It also provided for consultation and compensation where native title had been extinguished.<sup>145</sup>

The passage of the Native Title Act fueled a backlash against Aboriginal land rights. The resistance against Aboriginal land rights is apparent among mining and pastoral interests, as well as average white Australians.<sup>146</sup> With the coming expiration of leases on many of the large pastoral properties, there is widespread fear of an "Aboriginal land grab"<sup>147</sup> and concern that newly recognized Aboriginal land rights will be used to obstruct development.<sup>148</sup> By December 1996, more than 300 native title claims had been filed.<sup>149</sup> However, uncertainty surrounding the nature of native title has contributed significantly to the failure of any of the claims to receive approval.<sup>150</sup>

In December 1996, the Australian High Court handed down another historic decision, which resolved some of the questions left unanswered by both *Mabo* and the Native Title Act. The opinion in *The Wik Peoples and the Thayorre People v. The State of Queensland & Ors*<sup>151</sup> threatens to rival *Mabo* in its wide-ranging impact on property rights in Australia. In a narrow 4-3 opinion, the High Court affirmed that native title coexists with pastoral interests, but held that where the two conflict, the pastoral interests dominate.<sup>152</sup> The opinion has elicited a firestorm of resistance from pastoralist and mining interests and has created much uncertainty

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143. Native Title Act, 1993 (Austl.).

144. See id. at §§ 61-74, 80-94 (Austl.).

145. See id. at §§ 17, 18, 20, 48-54.

146. See, e.g., Bad Dreamtime in No-Man's Land, *Swiss Rev. World Aff.*, Sept. 2, 1996, available in LEXIS, News Library, Swswld File; Nicholas Woodsworth, Is Sympathy Running Out for Australia's Aborigines?, *Fin. Times*, Aug. 31, 1996, at 3, available in LEXIS, News Library, Fintme File.

147. Woodsworth, *supra* note 146.

148. See Rachel Bridge, Warning by Gold Miners on Land Rights, *The Times* (London), Aug. 1, 1996, available in 1996 WL 6510453.

149. See Partial Victory for Aboriginal Land Claims in Australia, *Asian Pol. News*, Dec. 30, 1996, available in 1996 WL 12776236.

150. See id.

151. No. B008 and B009 of 1996 (Austl. 1996), available in LEXIS, Aust Library, Auxmax File, 1996 Aust Highct Lexis 76 [hereinafter *The Wik Peoples*].

152. See Court Supports Aboriginal Rights to Make Land-Ownership Claims, *Asian Wall St. J.*, Dec. 24, 1996, at 5.

regarding the economic future of the powerful pastoral and mining industries.<sup>153</sup> The current government is openly debating amendments to the Native Title Act that would legislatively extinguish native title on pastoral properties. One possibility is an amendment to the Racial Discrimination Act, which would legalize anti-Aboriginal discrimination in this area.<sup>154</sup> At the same time, the very role of the High Court and procedures for judges' accession to the Court also face an uncertain future at the constitutional convention slated to take place later this year.<sup>155</sup>

In sum, Australia's European colonizers introduced a legal and political system that ignored the existence of Australia's indigenous peoples and purported to nullify their rights to their ancestral lands. After two centuries of blind allegiance to the impoverished legal doctrine at the core of its laws, Australia faces the difficult challenge of reconciling Aboriginal land rights and other rights with the realities of two hundred years of settlement. The statutory "creation" of rights, controversial High Court decisions, popular reaction, and the social and economic upheaval facing the country provide a wide array of examples to developing countries seeking to resolve similar conflicts.

### C. CONTRASTING EXPERIENCES; VALUABLE LESSONS

The legal responses of the Australian and United States colonists to the indigenous peoples of their acquired territories stand in sharp contrast to each other, ranging from recognition of indigenous sovereignty and land ownership rights in the United States, to total denial of the existence of those rights in the Australian context. The legal devices employed by each of the two nations to justify the conquest of indigenous people and the acquisition of indigenous lands — as well as later attempts by both countries to assimilate and/or compensate the original inhabitants of the two continents — offer practical lessons to developing countries regarding the types of programs and policies they should or should not adopt as they attempt to reconcile indigenous land rights and the demands of economic development.

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153. See Suganthi Singarayar, *Australia: For Aborigines, Racial Discrimination Act is Sacred*, Inter Press Service, Jan. 27, 1997, available in 1997 WL 7073346.

154. See Mohan Kuppusamy, *Testing Time for Australian Politics*, Business Times (Singapore), Feb. 21, 1997, available in 1997 WL 7764587.

155. See *id.*

#### IV. CONFLICTS BETWEEN INDIGENOUS LAND RIGHTS AND DEVELOPMENT IN BRAZIL AND THE PHILIPPINES

Reconciling indigenous land rights and the demands of economic development poses serious challenges to the governments of Brazil and the Philippines. Pressure for economic development by logging, mining, and government development projects has led to the loss of land by indigenous people in the two countries and deteriorating social conditions among tribal peoples.<sup>156</sup> In addition, development activities on indigenous land adversely affect the environment, and thereby have serious consequences for both indigenous peoples and the rest of the population.<sup>157</sup>

In both Brazil and the Philippines, the constitutional stage is set for an active and committed role to be played by the state in the adoption of legislative initiatives that would fulfill the four criteria proposed in Part V:<sup>158</sup> Aboriginal title to land is recognized in the constitutions of both countries, and the state, not private parties, has title to most land traditionally occupied by indigenous communities.<sup>159</sup> Both states also own mineral wealth and other natural resources, giving them the legal power to pursue policies in favor of indigenous land rights. Neither country, however, has given full effect to the indigenous land rights delineated in its constitution. The legislative actions undertaken thus far have been ambivalent, and leave the rights of the indigenous populations drifting in legal limbo.

##### A. THE PHILIPPINES

The Republic of the Philippines is a democratic republic with an elected president and political parties. According to the Philippine Regalian doctrine, the founding principle of the nation's

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156. See *infra* Parts IV.A.1, IV.B.1.

157. The mercury released by illegal miners in the Amazon rain forest causes nerve damage to people who eat contaminated fish. The mining activity also discharges large amounts of sediment, depositing silt in hydroelectric dams. See Molly O'Meara, Brazil's "Genocide Decree," *World Watch*, Sept. 19, 1996, available in 1996 WL 13656285; L. Roberto Barroso, *The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies*, 7 *St. Thomas L. Rev.* 645, 661 (1995).

158. See *infra* Parts IV.A.3., IV.B.3.

159. See *infra* notes 190, 243, and accompanying text for a discussion of Article XII, § 2 of the Philippine Constitution and Article 20, clauses IX and XI of the Brazilian Constitution.

land tenure system,<sup>160</sup> Ferdinand Magellan's 1521 claim of sovereignty in the name of the Spanish Crown vested exclusive ownership over the entire Philippine archipelago in the sovereign.<sup>161</sup> The legal effect was to displace the sovereign rights of the indigenous population and to transform the indigenous people into mere occupants with no legal rights.<sup>162</sup> Consequently, in the absence of documentation, all land is in the public domain; that is, it belongs to the government.<sup>163</sup>

Estimates of the relative size of the indigenous population in the Philippines range from two percent<sup>164</sup> to eighteen percent of the total population.<sup>165</sup> Having been displaced by invading lowlanders,<sup>166</sup> tribal people are now located mostly in remote mountain areas.<sup>167</sup> They have higher illiteracy, unemployment, and mortality rates than the general population.<sup>168</sup> A recent ILO mission report on the Philippines declared: "Any program aimed at improving the status and position of Filipino indigenous peoples in

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160. See Owen J. Lynch, Jr., *Indigenous Rights in Insular Southeast Asia in Southeast Asian Tribal Groups and Ethnic Minorities*, 22 *Cultural Survival Report* 31-32 (1987).

161. See *id.*

162. See *id.*

163. See *id.*; see also *infra* Part IV.A.2 for an analysis of the Philippine Constitution. Note the similarity of the Philippine Regalian doctrine to the Crown land principle of the Australian land holding system.

164. See *Philippines Human Rights Practices 1993*, U.S. Department of State Dispatch, Jan. 31, 1994, *available in* LEXIS, News Library, Dstate File [hereinafter 1994 State Department Dispatch].

165. See Isagani de Castro, *Philippines-Development: Wheel of Progress Runs Over Minorities*, Inter Press Service, Sept. 13, 1995, *available in* LEXIS, News Library, Inpres File. De Castro estimates that there are about 12 to 13 million indigenous people from 40 tribal groups in the Philippines. *Id.* A March 1995 Department of State Dispatch estimated that the indigenous population makes up 10-15% of the Philippine population. See *Philippines Human Rights Practices, 1994*, U.S. Department of State Dispatch, March 1995, *available in* Lexis, News Library, Dstate File [hereinafter 1995 State Department Dispatch].

166. See Ramon Isberto, *Philippines: Desperate Tribals Pursue Ancestral Land Claims*, Inter Press Service, Mar. 23, 1992, *available in* LEXIS, News Library, Inpres File. In the case of the B'laan people, settlers from the lowlands moved onto B'laan ancestral lands in response to governmental encouragement. See Pratap Chatterjee, *Philippines: Indigenous People Occupy Dole Pineapple Plantation*, Inter Press Service, Feb. 16, 1996, *available in* 1996 WL 7881613. The settlers' ownership of the land has been confirmed by the government, legally dispossessing the B'laan. See *id.*

167. See 1994 State Department Dispatch, *supra* note 164.

168. See de Castro, *supra* note 165; see also 1995 State Department Dispatch, *supra* note 165 (attributing the difference in the indigenous population's standard of living to the remoteness of its habitats and its inability to participate effectively in decisions affecting its lands, culture, and traditions); 1994 State Department Dispatch, *supra* note 164.

the national society must address the land tenure insecurity and dispossession affecting these peoples."<sup>169</sup>

### 1. *Development Pressures and Loss of Land*

#### a. *Logging and Development Projects*

Logging and development projects on ancestral tribal land, supported by powerful groups that continue to dominate political and economic life in the Philippines, threaten indigenous communities.<sup>170</sup> In the 1950s, three-quarters of the land area in the archipelago nation supported virgin rain forest. Today, the figure hovers around twenty-five percent.<sup>171</sup> Between 1980 and 1990, 300,000 hectares of forest area were destroyed annually.<sup>172</sup> In 1992, in an attempt to protect the archipelago's remaining forest areas, the Philippine government phased out timber license agreements.<sup>173</sup> The logging companies turned to the Industrial Forest Management Agreement (IFMA),<sup>174</sup> which leases depleted land for logging in a cycle of plant-harvest-replant.<sup>175</sup> Because the land is leased to concessionaires for twenty-five-year periods, sometimes without the knowledge of the resident tribe,<sup>176</sup> the program has encountered strong opposition from tribal groups who claim the territories as their ancestral lands.<sup>177</sup> The groups predict that they will experience further dislocation and marginalization as the inevitable result of IFMA.<sup>178</sup>

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169. de Castro, *supra* note 165.

170. See 1994 State Department Dispatch, *supra* note 164.

171. See Yul Caringas, Philippines: Tribes on Warpath to Protect Ancestral Land, Inter Press Service, Aug. 22, 1995, available in LEXIS, News Library, Inpres File.

172. See Group Asks Institutions Not to Fund Projects Hurting Minorities, Deutsche Presse-Agentur, Mar. 10, 1995, available in LEXIS, News Library, Dpa File.

173. See Caringas, *supra* note 171. Although indigenous people have lived there for centuries, all forest land with a slope of more than 18% was declared to be government land, effectively denying the tribes ownership of such lands. *Id.* This policy is part of the government's attempt to conserve the remaining forest land; however, it could mean removal of the indigenous communities.

174. See Caringas, *supra* note 171.

175. See *id.*

176. See Philippines Tribes Fear Being Displaced by Reforestation, Agence France Presse, Mar. 10, 1995, available in 1996 WL 7775383.

177. See *id.*

178. See *id.*

Tribal groups are also threatened with displacement from their ancestral lands by state-initiated development projects.<sup>179</sup> For example, in September 1992, the Lumad tribes on Mindanao Island protested against the construction of a government geothermal project, which would have encroached on their sacred mountain.<sup>180</sup> Furthermore, some tribes may experience a cycle of displacement. On July 29, 1995, Reuters World Service reported that the planned construction of a dam in Benguet Province would displace groups previously displaced in the 1950s by the construction of Ambuklao and Binga dams and would also submerge the seat of culture of the Ibaloi people.<sup>181</sup> In addition, illiterate tribal groups sometimes are deceived into selling their land,<sup>182</sup> increasing the displacement of tribal peoples.

### b. *Mining*

Mining is an additional source of trouble for indigenous land interests. In an attempt to give new life to its sagging mining sector, the Philippine government passed the Philippine Mining Act in 1995.<sup>183</sup> This law was designed to attract foreign companies to the Philippines.<sup>184</sup> The law allows foreign companies to enter into financial or technical assistance agreements (FTAAs) with the Philippine government in order to undertake large scale mineral exploration.<sup>185</sup> Under the terms of the Act, companies that are 100% foreign-owned may wholly own their local Philippine operations, repatriate all their profits, and apply for renewable

179. See Isberto, *supra* note 166.

180. See Lian Nemenzo, Philippines: On a Dormant Volcano, Tribes Oppose Power Project, Inter Press Service, Sept. 19, 1992, *available in* LEXIS, News Library, Inpres File. The hydro-electric plants already constructed in the region had been damaged by floods and droughts caused by excessive logging. The tribal elders also protested the lack of compensation or employment opportunities and continued environmental damage. See *id.*

181. Tribal Filipinos Oppose Dam Construction, Reuters World Service, July 29, 1995, *available in* LEXIS, News Library, Reuwlid File.

182. See Isberto, *supra* note 166.

183. Johanna Son, Philippines — Environment: Waste Spill Muddies the Mining Industry, Inter Press Service, Apr. 2, 1996, *available in* 1996 WL 9809751; Environment, Tribes Protected Under New Philippine Mine Law, Vancouver Sun, Dec. 20, 1996, *available in* 1996 WL 5035397.

184. Export earnings from mining had fallen from a high of 25% of total exports in 1985 to a mere 6% in 1995. See Edward Luce, Nationalist Concerns Stall Philippine Mining Hopes, The Financial Post, Apr. 10, 1996, *available in* 1996 WL 5728162.

185. See Maricris C. Carlos, Mining Industry: Towards Protecting the Environment, BusinessWorld (Manila), Aug. 1, 1996, *available in* 1996 WL 11688170.

exploration rights over sites up to 90,000 hectares in size.<sup>186</sup> By August 1, 1996, the legislation had attracted more than seventy FTAA applications from foreign mining companies,<sup>187</sup> but the Mines and Geosciences Bureau (MGB) of the Department of Environment and Natural Resources (DENR) had completed evaluations of and approved only two applications.<sup>188</sup>

The effects of this Act could be the removal of indigenous peoples from their land, loss of control of resources, destruction of traditional lifestyles, as well as creation of pollution and other detrimental environmental consequences of mining exploitation.

## 2. *Constitutional Parameters for Governmental Action*

### a. *State Control of Resources*

Under the 1987 Constitution of the Republic of the Philippines,<sup>189</sup> the state has ownership and control of all land in the public domain and of the natural resources on that land.<sup>190</sup> The state also has full control and supervision over the exploration and development of natural resources.<sup>191</sup> The Philippine Constitution provides for the state's classification of the entire public domain into "agricultural, forest or timber, mineral lands, or national parks."<sup>192</sup> Of land in the public domain, only lands classified as agricultural are alienable.<sup>193</sup> Other land in the public domain can be leased for up to twenty-five years to private corporations or

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186. See Luce, *supra* note 184. In February 1997, an indigenous tribe requested that the Philippine Supreme Court revoke the Mining Act as unconstitutional. See *Philippine Tribal Group Files Class Suit to Nullify Mining Act*, Agence France-Presse, Feb. 7, 1997, available in 1997 WL 2054878.

187. See Carlos, *supra* note 185. Sixty-five of the FTA applications cover 22% of the Philippine land mass. See *Philippines to Pursue Mining Without Risking Environment*, Agence France-Presse, Feb. 6, 1997, available in 1997 WL 2054280.

188. See Carlos, *supra* note 185. A claim for the revocation of one of the grants has already been filed. See *Philippine Tribal Group Files Class Suit to Nullify Mining Act*, *supra* note 186.

189. Phil. Const., reprinted in *Constitutions of the Countries of the World* (Albert P. Blaustein & Gisbert H. Flanz eds., 1971).

190. See Phil. Const. art. XII, § 2 ("All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State . . .").

191. See Phil. Const. art. XII, § 2 ("The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.").

192. Phil. Const. art. XII, § 3.

193. See *id.*



associations.<sup>194</sup> Several provisions of the constitution are environmentally friendly,<sup>195</sup> and Section 4 of Article XII provides for the Congress to define the boundaries of various categories of public lands with a view to environmental conservation.<sup>196</sup>

### b. *Rights of Indigenous Peoples*

Several provisions of the 1987 constitution expressly address the rights of indigenous people. First, under the heading "State Policies," Article II, Section 22 affirms the following: "The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."<sup>197</sup> However, the limitation "within the framework of national unity and development" suggests that such recognition and promotion are qualified goals.<sup>198</sup> Second, Section 5 of Article XII is a key provision for the protection of indigenous land rights.<sup>199</sup> Here also, however, the recognition and protection of rights are denied fundamental character by the limitations of the provision.

Nonetheless, the constitutional stage is set for indigenous rights to be secured, both by other constitutional provisions and national development policies. For example, if Section 5 were to result in the adoption of legislation that is true to its spirit,<sup>200</sup>

194. See, e.g., *supra* note 174 and accompanying text.

195. For example, in Article II of the Constitution, under the heading "State Policies," § 16 declares that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." Phil. Const. art. II, § 16.

196. See Phil. Const. art. XII, § 4 ("The Congress shall . . . determine by law the specific limits of forest lands and national parks . . . [S]uch forest lands and national parks shall be conserved and may not be increased nor diminished, except by law. The Congress shall provide . . . measures to prohibit logging in endangered forests and watershed areas.").

197. Phil. Const. art. II, § 22.

198. The policies currently pursued by the government with regard to both promotion of indigenous rights and protection of the ecology seem to bear out this proposition. See *infra* Parts IV.A.1, IV.A.3.

199. See Phil. Const. art. XII.

The State, subject to the provisions of this Constitution and *national development policies and programs*, shall protect *the rights of indigenous cultural communities to their ancestral lands* to ensure their economic, social, and cultural well-being. The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

*Id.* § 5 (emphasis added).

200. This is by no means certain as the provision *permits* but does not *mandate* the use of such measures.

this would fulfil the second of the Four Criteria proposed in Part V — the recognition of indigenous land rights and incorporation of indigenous community traditions into municipal property doctrines.

Additionally, although not specifically addressed to indigenous communities, Article XIII (Urban Land Reform and Housing), Section 10 might provide some protection to indigenous peoples in the Philippines.<sup>201</sup> This section prohibits eviction and resettlement without consultation and thus gives the state and indigenous tribes the opportunity to work together to minimize the adverse effects of displacement. This requirement could be a practical method of satisfying the last of the Four Criteria proposed in Part V, which demands consultation with indigenous peoples.

Finally, under Article XVI (General Provisions), Section 12 of the constitution, "[t]he Congress may create a consultative body to advise the President on policies affecting indigenous cultural communities, the majority of the members of which shall come from such communities."<sup>202</sup> No such committee has been formed.<sup>203</sup>

In sum, though the Philippine Constitution mentions the indigenous population several times, the indigenous rights that it recognizes are not fundamental, and it is not the state's duty to protect those rights. Furthermore, since the land ownership structure is based on the discriminatory Regalian Doctrine,<sup>204</sup> the land rights of indigenous peoples in the Philippines remain uncertain at best.

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201. Phil. Const. art. XIII, § 10 ("Urban or rural poor dwellers shall not be evicted nor their dwellings demolished, except in accordance with law and in a just and humane manner. No resettlement of urban or rural dwellers shall be undertaken without adequate consultation with them and the communities where they are to be relocated."). The indigenous tribes, by virtue of the poverty in which they live, fall within the category of the rural poor.

202. Phil. Const. art. XVI, § 12. In addition, Article XIV (Education, Science and Technology, Arts, Culture, and Sports), § 17 declares that "[t]he State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national plans and policies." This provision suggests a tolerant view toward indigenous cultural autonomy and the goal of maintaining a diverse national society.

203. However, in July 1995, President Fidel Ramos, through an administrative order, ordered the creation of a national committee for the observance of the International Decade of the World's Indigenous Peoples. The committee is charged with creating a national program that will give due recognition to the nation's indigenous peoples. Ramos also said that the Philippines had taken steps to recognize its own indigenous peoples and to preserve their cultures. Ramos Declares National Decade for Indigenous Peoples, Xinhua News Agency, July 15, 1995, available in LEXIS, News Library, Xinhua File.

204. See *supra* note 160 and accompanying text.

### 3. *Legislative Initiatives*

Apart from constitutional provisions, the Philippine government has taken some action toward fulfilling its responsibilities to its indigenous people in other ways. For example, in 1994, the government enacted legislation that anticipated the implementation of the constitutional provisions recognizing indigenous ancestral domains<sup>205</sup> and introduced the Certificate of Ancestral Lands (CALC) and Certificate of Ancestral Claims (CADC).<sup>206</sup> Since the program is only an interim measure, passed by the executive and not the entire legislature, tribal groups still await the passage of enabling legislation in the Senate in furtherance of rights enshrined in the constitution.<sup>207</sup> Thus, until the legislature implements the provisions of the constitution, the security of indigenous land ownership remains in doubt.

Additionally, in November 1996, pending passage of a law recognizing rights of indigenous peoples to their land and resources, the DENR issued guidelines regarding the management of CADCs.<sup>208</sup> Under the guidelines, indigenous cultural communities (ICCs) have the right to plan the management, protection, and development of their ancestral territories through individual Ancestral Domain Management Plans (ADMPs).<sup>209</sup>

Finally, in December 1996, following an accident involving leakage of waste from a mine in the Central Philippines, the

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205. See Phil. Const. art. XII, § 5; see also *supra* Part IV.A.2. for an analysis of the Philippine constitutional provisions regarding indigenous land ownership.

206. See Isberto, *supra* note 166. CALCs are issued to individuals, while CADCs are issued to indigenous groups occupying communal territory. See Digna B. Verbo-Velasco, *More Ancestral Domain Claims to Be Recognized*, *BusinessWorld* (Manila), Jan. 7, 1997, *available in* 1997 WL 7197881. The certificates give the holders the vested right to benefit from and protect resources in the covered area. See *id.* Outsiders interested in development and exploitation of resources within the CALC/CADC area must first receive the prior informed consent of the community. See *id.* In order to receive a CALC/CADC, indigenous groups submit applications to the Department of Energy and Natural Resources (DENR) along with anthropological, archaeological, and other data. As of September 26, 1996, DENR had issued 53 CADCs and 110 CALCs, while several hundred applications await processing and evaluation. See *Tribe Applies for Ancestral Domain Claim Certificates*, *BusinessWorld* (Manila), Sept. 26, 1996, *available in* 1996 WL 11854268.

207. See *Ethnic Leaders Hold Forum with DENR*, *BusinessWorld* (Manila), Nov. 18, 1996, *available in* 1996 WL 11857012.

208. See *DENR Releases Rules on Managing Certified Ancestral Domain Claims*, *BusinessWorld* (Manila), Nov. 21, 1996, *available in* 1996 WL 11857174.

209. See *id.* In addition, the Environment Secretary promised that all holders of CADCs would receive 1 million pesos to implement their ADMPs. See *id.*

government issued new rules aimed at strengthening environmental laws and protecting indigenous landowners.<sup>210</sup> By issuing the new regulations, the government is attempting to allay the fears of indigenous groups and environmentalists regarding the new mining legislation.<sup>211</sup> Mining companies must both obtain permission from indigenous people before exploring their land and give them royalties amounting to one percent of output.<sup>212</sup> The law also requires the mining companies to contribute a percentage of costs toward community development projects and to set up structures to limit environmental damage.<sup>213</sup>

The Philippines is struggling to reconcile the necessity of economic development with the responsibilities owed to its indigenous peoples. The Philippine government appears to be juggling different elements of both pressures, afraid or unable to fully commit to either. While this lack of commitment persists, indigenous tribes are left in limbo. The Four Criteria proposed in Part V offer a suggested resolution of these conflicting interests.

## B. BRAZIL

Brazil is a constitutional republic comprised of twenty-six states and one federal district.<sup>214</sup> The indigenous people, who currently number about 250,000 and speak 170 different languages,<sup>215</sup> have a constitutional right to their lands.<sup>216</sup> Under the 1988 constitution, all Indian lands were to have been demarcated by 1993.<sup>217</sup> The indigenous land policy and demarcation of Indian

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210. See Environment, Tribes Protected Under New Philippine Mine Law, *Vancouver Sun*, Dec. 20, 1996, *available in* 1996 WL 5035397.

211. See *id.*

212. See *id.*

213. See *id.*

214. See Brazil Human Rights Practices 1994, U.S. Department of State Dispatch, March 1995, *available in* LEXIS, News Library, Dstate File.

215. See *id.* When the Portuguese arrived, the indigenous population numbered approximately five million. Michael Christie, Rights Groups Alarmed At Brazil Indian Decree, *Reuters*, Jan. 26, 1996, *available in* LEXIS, News Library, Reuna File.

216. See *supra* Part III.B.2. for an analysis of Brazil's 1988 Constitution.

217. See Jan Rocha, Survival: Rape by Decree, *The Guardian* (London), Jan. 31, 1996, *available in* LEXIS, News Library, Guardn File. Together, the over 500 reserves would cover approximately 10% of Brazil's national territory. See Second Thoughts About Yanomami, Latin America Regional Reports: Brazil, *Latin Am. Newsl., Ltd.*, Feb. 16, 1995, at 7, *available in* LEXIS, News Library, Lan File. On November 16, 1991, President Collor of Brazil announced the demarcation of an area encompassing 9.4 million hectares to the Yanomami Indians. See Barroso, *supra* note 157, at 662. The area in question is 23.71 million acres,

lands has faced severe opposition from a variety of non-governmental sources.<sup>218</sup> As a result, of the 554 planned demarcations, 344 have not yet been entered into the official land registry.<sup>219</sup> In addition, successive governments have denied funding to Fundação Nacional do Índio (FUNAI),<sup>220</sup> the government agency in charge of indigenous affairs. FUNAI had previously been given wide latitude to define the boundaries of the indigenous lands.<sup>221</sup>

### 1. Development Pressures and Their Impact

The national government has shown greater generosity in establishing large areas for the Indians than in actually protecting them from outside depredations.<sup>222</sup> Most Indian lands in Brazil are located in the Amazon basin. The lands are lush rain forests rich in mineral reserves.<sup>223</sup> They continue to be invaded by illegal miners and loggers, who bring violence,<sup>224</sup> disease,<sup>225</sup> and

approximately the size of Portugal, all set aside for the exclusive use of some 6,700 Indians. See *Thousands of Yanomami Threaten to Fight to Defend Their Land in Brazil*, Agence France-Presse, Jan. 19, 1996, *available in* 1996 WL 3790652.

218. Demarcation is opposed by logging companies, small time gold miners (garimpeiros), the states within which the Indian lands lie, and certain factions of the military. See, e.g., *Brazil Human Rights Practices 1994*, U.S. Department of State Dispatch, March 1995; *Second Thoughts About Yanomami*, Pressure on the Biggest Reservation is Growing, *Latin Am. Newsl., Ltd.*, Feb. 16, 1995 *available in* LEXIS, News Library, Lan File; Diana Jean Schemo, *Brazil Indefinitely Postpones Ruling on Indian Land Claims*, N.Y. Times, Oct. 11, 1996, at A5.

219. See *Brazil — Environment: NGOs Protest Cardoso Move On Indian Lands*, Inter Press Service, Feb 2, 1996, *available in* 1996 WL 7881335.

220. Rocha, *supra* note 217.

221. See *Outrage Over Indian Lands Decree; Church and Pressure Groups Denounce 'Retrograde Step'*, *Lat. Am. Wkly. Rep.*, Jan. 25, 1996, at 29, *available in* LEXIS, News Library, Lan File; Rocha, *supra* note 217. Some observers feel that the change will add balance to the process, pointing to such "abuses" as the demarcation of 350,000 acres to an Indian group that had dwindled to 12 members. See Laurie Goering, *Brazil Indians, Land Developers Battle; Decree Could Cut Reserves*, *Chi. Trib.*, Jan. 21, 1996, at 15.

222. Barraso, *supra* note 157, at 657-58. Recently, a spokesman for the Catholic Church condemned the government for its policy of "negligence on the most important issues for indigenous people, like . . . the non-preservation of their lands." *Church Hits Brazil Over Treatment of Indians*, *Seattle Post-Intelligencer*, Nov. 7, 1996, at A8, *available in* 1996 WL 6459159.

223. See O'Meara, *supra* note 157.

224. For example, more than 2,000 Yanomami Indians have died in clashes with miners. See Goering, *supra* note 221.

225. For example, in the first six months of 1996, health workers recorded 1755 cases of malaria and an increase in tuberculosis among the Yanomami. Before the invasion by the miners, the diseases were unknown to the tribe. See *id.*

cultural dislocation to the indigenous populations.<sup>226</sup> The long isolation of Brazil's indigenous population makes the tribal peoples vulnerable to common diseases transmitted by outsiders.<sup>227</sup> If the tribes are to survive, they must have sufficient land to buffer them from outsiders.<sup>228</sup>

In addition, illegal logging and mining, and an increasing national population pose grave threats to indigenous populations. Deforestation in Brazil has increased from 11,130 square kilometers in 1991 to 14,896 square kilometers in 1994.<sup>229</sup> Logging operations on Indian land are illegal,<sup>230</sup> but continue to be carried out on a large scale.<sup>231</sup> The Brazilian government has made some attempts to prevent the illegal logging,<sup>232</sup> but the resources committed to that end are inadequate,<sup>233</sup> as are the legislative responses.<sup>234</sup> Furthermore, Indian lands continue to be invaded by illegal miners (*garimpeiros*) despite several initiatives undertaken by the government.<sup>235</sup> In addition to violence and diseases,<sup>236</sup> the *garimpeiros* compound the problem of deforestation of Indian lands by clearing airstrips in the rain forest in order to supply their operations.<sup>237</sup> Finally, the burgeoning population of landless rural workers also poses a threat to the land holdings of indigenous peoples in Brazil. Although one percent of landowners owns forty-six percent of the land,<sup>238</sup> while fifty-three percent of the

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226. See Ellison, *infra* note 302, for an account of the rising suicide rate among the Guarani. Confined to small patches of land with their cultural life dislocated, suicide has become a popular way to avoid the trauma of daily life. See *id.*

227. See Thousands of Yanomami Threaten to Fight to Defend Their Land in Brazil, *Agence France-Presse*, Jan. 19, 1996, *available in* 1996 WL 3790652.

228. See Barroso, *supra* note 157, at 663-64.

229. See Jamie Drummond, Tribes Who Won't See the Forest for the Sleaze, *The Independent* (London), Jan. 4, 1997, *available in* 1997 WL 4470037.

230. See *id.*

231. See *id.*

232. See *id.*

233. See *id.* Ibama (the Brazilian environment police) are said to be "100 percent branch offices of the logging companies." *Id.* Despite the increase in deforestation rates, the agency's budget was cut by 40% in 1995. See *id.*

234. In July 1996, the Brazilian government announced a ban on new mahogany logging licenses and a re-evaluation of all existing licenses. See *id.*

235. During an earlier wave of invasion by illegal miners, the government made several failed attempts to remove the intruders from Indian land. See Goering, *supra* note 221.

236. See *id.*

237. On the Yanomami reserve alone, at least 10 flights per day to illegal airstrips transport more supplies and more *garimpeiros* into the forest. See *id.*

238. See Uncas Fernandez, *Brewing Land Conflicts Could Worsen in Brazil*, *Agence France-Presse*, Sept. 2, 1996, *available in* 1996 WL 3916480.

rural population owns three percent of land,<sup>239</sup> the government has not fulfilled its promise to redistribute land to the rural poor.<sup>240</sup> No longer trusting the government's redistribution promises, the rural workers have resorted to illegal takeovers and clashes with government forces.<sup>241</sup>

## 2. *Constitutional Parameters for Governmental Action*

The Brazilian Constitution expressly provides for the protection of Indian rights to land,<sup>242</sup> and clearly delineates the wide-ranging powers and responsibilities of the federal government and the Congress with regard to land and mineral resources. Article 20, clause IX of the constitution reserves to the federal government the rights to all mineral resources, including those in the subsoil, while clause XI of the same Article makes lands traditionally occupied by Indians the property of the federal government.<sup>243</sup> Therefore, the state has the power to confer ownership of traditional lands on the tribes that occupy them. As it owns the mineral resources found on such land, the state would also control mining projects on the traditional territory of the tribes. In addition, Article 49, clause XVI gives the National Congress the exclusive power to authorize the exploitation and use of water resources, and prospecting and mining of mineral wealth on Indian lands.<sup>244</sup>

Second, the constitution expressly recognizes the land rights of indigenous Brazilians in a chapter entitled "Indians," which repeats previous provisions in the constitution and adds further protections.<sup>245</sup> For example, Section 2 designates the lands

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239. See *id.*

240. See *id.*

241. See *id.* See also Gavin O'Toole, *Other Worlds: Brazil's Poor Pay Bloody Price in Battle for Land*, *The Guardian* (London), June 14, 1996, available in 1996 WL 4029433.

242. See *Constituição Federal* [hereinafter C.F.] art. 231 (Braz.), translated in *Constitutions of the Countries of the World*, vol. 3 (Albert P. Blaustein & Gisbert H. Flanz eds. & Keith S. Rosenn trans., 2d ed. 1997).

243. See C.F. art. 20, cl. IX, XI ("Property of the Federal Government is . . . mineral resources, including those in the subsoil; . . . lands traditionally occupied by Indians.").

244. See C.F. art. 49, cl. XVI ("The National Congress shall have exclusive powers . . . to authorize exploitation and use of water resources, prospecting and mining of mineral wealth on Indian lands.").

245. See C.F. art. 231 ("The social organization, customs, languages, creeds and traditions of Indians are recognized, as well as their original rights to the lands they traditionally occupy. The Federal government has the responsibility to delineate these lands and to protect and assure respect for all their property." (emphasis added)); see also *id.* at § 10 ("Lands tra-

traditionally occupied by Indians as their *permanent* possession and provides that they are entitled to the exclusive usufruct of the riches of the soil, rivers, and lakes.<sup>246</sup> Certain types of development on Indian land, including mineral prospecting and mining, specifically require authorization by the National Congress,<sup>247</sup> while unauthorized occupation and possession is void under the law.<sup>248</sup> Section 4 makes the Indian lands inalienable and non-transferable and forbids the running of statutes of limitations against them.<sup>249</sup> Section 5 forbids the forcible relocation of Indian communities except in the case of epidemics or in the interests of the sovereignty of the country, and only by referendum of the National Congress.<sup>250</sup> Further, it guarantees the communities' immediate return to their lands as soon as the risk ceases.

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ditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable for the preservation of environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions.").

246. See C.F. art. 231, § 20 ("The lands traditionally occupied by Indians are destined for their permanent possession, and they shall be entitled to the exclusive usufruct of the riches of the soil, rivers and lakes existing thereon.").

247. See C.F. art. 231.

Utilization of hydric resources, including their energy potential, and prospecting and mining of mineral wealth on Indian lands may only be done with the authorization of the National Congress, after hearing from the communities involved, which shall be assured of participation in the results of the mining, in the form of the law.

Id. § 3.

248. See C.F. art. 231.

Acts aimed at the occupation, dominion and possession of the lands referred to in this article, or at exploitation of the natural wealth of the soil, rivers and lakes existing thereon, are null and void, producing no legal effects, except in the case of relevant public interest of the Federal Government, according to the provisions of a complementary law; such nullity and extinction of acts shall not give rise to a right to compensation or to sue the Federal Government, except, in the form of the law, for improvements resulting from occupation in good faith.

Id. § 6.

249. See C.F. art. 231, § 4 ("The lands dealt with in this article are inalienable and non-transferable, and the statute of limitations does not run against rights thereto." (emphasis added)).

250. See C.F. art. 231.

Removal of Indian groups from their lands is prohibited except by referendum of the National Congress, in the event of epidemic that places the population at risk or in the interest of the sovereignty of the Country, after deliberation of the National Congress, guaranteeing, under all circumstances, immediate return as soon as the risk ceases.

Id. § 5.



The constitution also addresses the legal status of indigenous populations and delineates the powers and responsibilities of the government to these populations.<sup>251</sup> Under Article 22, clause XIV, the constitution grants the federal government exclusive powers to legislate with regard to indigenous populations.<sup>252</sup> In Article 109, clause XI, the constitution confers on federal judges jurisdiction over disputes involving the rights of Indians.<sup>253</sup> At the same time, under Article 129, clause V, the legal defense of the rights and interests of the indigenous populations is one of the institutional functions of the Public Ministry.<sup>254</sup>

The constitution grants Brazil's Indians standing to sue to protect their rights and interests,<sup>255</sup> conferring a powerful defensive weapon on the indigenous population. Although the constitution reiterates the right of the Public Ministry to intervene in such suits,<sup>256</sup> this recognition of standing remains significant.

### 3. *Legislative Initiatives*

A recent upheaval in Brazil's indigenous land rights policy reflects the conflict between the push toward economic development and the determination to give indigenous Brazilians the opportunity to continue their traditional lifestyle and to allow them to choose the future that they desire. On January 8, 1996, President Cardoso issued Decree 1775, giving individual squatters, such as miners, small farmers, loggers and ranchers, local state governments, and companies ninety days to exercise a new right to challenge the boundaries of Indian lands not yet demarcated.<sup>257</sup>

251. See C.F. art. 231.

252. See C.F. art. 22, cl. XIV ("The Federal Government has exclusive power to legislate on . . . indigenous populations.").

253. See C.F. art. 109, cl. XI ("The federal judges have the power to try and decide . . . disputes over the rights of Indians.").

254. See C.F. art. 129, cl. V ("The institutional functions of the Public Ministry are . . . to defend judicially the rights and interests of the indigenous populations."). In Brazil, the Public Ministry is equal to the courts and is composed of public attorneys. See Barroso, *supra* note 157, at 655-56. The head of the Ministry is the highest ranking law enforcement official in the country. See *id.*

255. See C.F. art. 232 ("Indians, their communities and their organizations have standing to sue to defend their rights and interests, with the Public Ministry intervening in all stages of the procedure.").

256. See *id.*

257. See Brazil — Environment: NGOs Protest Cardoso Move on Indian Lands, Inter Press Service, Feb. 2, 1996, *available in* 1996 WL 7881335.

Human rights non-governmental organizations (NGOs) and indigenous groups perceived the decree as a reversal of the positive trends of the past thirty years.<sup>258</sup> The groups anticipated a possible repetition of the frontier-style violence such as the conflict that resulted in the slaughter of a village of Yanomami by garimpeiros along the Brazil/Venezuela border in 1993.<sup>259</sup> By the end of April, the deadline for the filing of claims, 1,066 challenges had been made to the demarcation of Indian lands across Brazil.<sup>260</sup> All of the challenges to the demarcations were dismissed by FUNAI, except for eight claims that Justice Minister Jobim returned to the agency for reconsideration.<sup>261</sup>

In October 1996, the Brazilian government postponed indefinitely its anticipated decision on one of those challenges — whether to uphold the claims of the Macuxi and other Indian tribes to a vast area of the country's territory.<sup>262</sup> In December 1996, Justice Minister Jobim announced the award of title to the Macuxi land to miners and ranchers who had illegally invaded the reserve.<sup>263</sup> The decision decreased the size of the reserve by 540,000 acres.<sup>264</sup> Federal Congressmen from Roraima boast openly that this decision is the result of a bargain struck in return for President Cardoso's reelection.<sup>265</sup>

The apparently solid constitutional protections granted to Brazil's indigenous peoples have proven to be empty promises. Facing opposition by powerful constituencies and the necessity of developing its natural economy, the Brazilian government has neg-

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258. See Rocha, *supra* note 217. Amnesty International, along with other human rights organizations, condemned the Decree as "a recipe for tragedy." Christie, *supra* note 215.

259. See Christie, *supra* note 215; Jack Weatherford, What a Year for the Natives, *Star Tribune* (Minneapolis/St. Paul), Jan. 21, 1994, at 17A.

260. Diana Jean Schemo, Brazil Indefinitely Postpones Ruling on Indian Land Claims, *N.Y. Times*, Oct. 11, 1996, at A5.

261. See *id.*

262. See *id.* Roraima, Brazil's northernmost state, has challenged 99% of the Macuxi claims, contending that the tribe should live under federal protection in their isolated villages. See *id.*

The day after the announcement, four Indian tribes, impatient with the government's long delay in demarcating their territory, marked off and laid claim to four million acres of ancestral lands in the northern Amazon. See *Indians in Northern Brazil Claim 4 Million Acres of Ancestral Lands*, Associated Press, Oct. 11, 1996, available in 1996 WL 4443944.

263. See *Brazil to Award Miners, Ranchers Title to Indian Land*, Dow Jones Commodities Service, Dec. 28, 1996, available in Westlaw, 12/28/96 DJCOMS 12:11:00.

264. See *id.*

265. See Jan Rocha, *Never-Never Land: Brazil's Indians Have Had Their Hopes Shattered Yet Again*, *Guardian* (London), Feb. 5, 1997, available in 1997 WL 2364665.

lected its constitutional obligations to the Indians. As the promised demarcation of Indian lands languishes in political limbo, lawlessness prevails in their remote ancestral lands and the tribes are decimated by diseases, violence, and despair.

### C. BRAZIL AND THE PHILIPPINES: A CALL TO ACTION

In sum, as Brazil and the Philippines increase the pace of their economic development, the disadvantages endured by their indigenous populations increase, endangering the survival of those populations as distinct communities. Recent actions undertaken by both countries demonstrate the difficulty of reconciling the pressures of economic development and indigenous land rights. In the absence of concerted and principled governmental action, constitutional provisions recognizing such rights have proven inadequate to protect their indigenous communities. If their indigenous people are to survive, preserving their culture and traditional lifestyles, the governments and their agencies must act now in accordance with the Four Criteria presented in Part V.

### V. RECOMMENDATIONS FOR THE PROTECTION OF INDIGENOUS LAND RIGHTS

Based on the Author's personal observations in Australia,<sup>266</sup> readings of international human rights documents, as well as analysis of U.S. and Australian history and recent developments in Brazil and the Philippines, the Author proposes the following "Four Criteria" that developing countries should fulfill in order to successfully balance economic development and indigenous rights: the commitment of state parties, institution of land claims procedures, secure titles to land, and the control of and participation in development projects by indigenous peoples.

The most fundamental step toward protecting indigenous people is to guarantee their legal rights to their traditional territory.<sup>267</sup> In order to implement this protection, the government

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266. During the summer of 1995, the Author interned with the Northern Land Council in Darwin, Australia under the auspices of the Columbia Law School Human Rights Internship Program.

267. Land is vital to the survival of indigenous communities because of its importance to their traditional economies, as well as the fact that it is the site of ancestral burials and often the locus of religious beliefs integral to the life of the community. See Torres, *supra*

must first genuinely commit its resources and moral will to fulfilling its duties to its indigenous populations. The apathy of governments sounds a death knell for any meaningful recognition and guarantee of those rights.<sup>268</sup> Second, in the absence of recognition of indigenous land ownership, an equitable land ownership recognition procedure must be instituted, incorporating the traditional world views and legal systems of a country's indigenous inhabitants into the legal framework of the dominant society. Third, once ownership is recognized, the security of tenure must be guaranteed. As the survival of indigenous communities is so closely linked to the existence of a land base, the ownership, possession, and use of indigenous land should be protected from arbitrary infringement or appropriation by either governmental or private actors. Indigenous territory should not be subject to loss by statutory amendments due to changes in policy or through fraudulently induced conveyances. The indigenous peoples' traditional mechanisms of use, possession and transmission of land should also be incorporated in municipal law. Fourth, a statutory procedure must be introduced that permits negotiation, on equal footing, between indigenous peoples and developers regarding projects on indigenous lands. This procedure must mandate control by indigenous communities in any development project and encourage their active participation in those projects, so that attendant advantages from infrastructure creation, employment, and other economic opportunities can be utilized fully by those communities. In this way, the unique knowledge of indigenous peoples can be incorporated into projects in the planning stages, so as to minimize adverse environmental, social, and cultural disturbances.

The international human rights documents examined in Part II provide the theoretical basis for the formulation of the Four Criteria. General human rights documents, although not specifically directed toward indigenous peoples, affirm the equality of such peoples and their right to own property and control their natural resources. The documents addressing indigenous rights

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note 62, at 138.

268. See, e.g., Susan Lope, Note and Comment, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 Sw. U. L. Rev. 331 (1994) (describing an example of the failure of the United States to protect the land rights of its Native American population). The history of both the United States and Australia and current developments in the Philippines and Brazil demonstrate the crucial role played by the state in safeguarding the rights and even the survival of native peoples.

also demand their participation and consultation with regard to development projects. The necessity of government commitment to the protection of such rights is implied in the documents. The history and experiences of the United States and Australia in interacting with indigenous peoples furnish practical guidelines for measures that can be implemented in order to satisfy the criteria.

A superficial analysis would suggest that errors committed by the United States in its interactions with its indigenous populations merely provide a vivid "how-not-to" list for developing countries. However, judicial doctrines developed in the United States<sup>269</sup> have been used to protect Native American tribes attempting to maintain their sovereignty, culture and separate life-style. At the same time, the Australian example of total non-recognition of Aboriginal land rights should not be emulated. Nevertheless, the legislative attempts to rectify this injustice, and the current struggle to reconcile Aboriginal land rights concepts with entrenched property law and societal norms furnish both a guideline and a warning to developing countries.

Moreover, the Australian and United States experiences demonstrate the necessity of immediate action toward indigenous land rights goals in Brazil and the Philippines. Both countries provide illuminating examples of the dangers of allowing the entrenchment of laws and societal norms that violate indigenous rights. In Australia, the recognition of Aboriginal land rights after 200 years of denial has evoked calls for amendment of the Racial Discrimination Act so as to legalize the discriminatory extinguishment of newly recognized Aboriginal native title rights. Both ordinary citizens and political leaders seem unable to conceive of a world in which the fundamental rights of indigenous peoples are incorporated into the legal regime of their nation. In the United States, the decision in *U.S. v. Washington*<sup>270</sup> elicited widespread noncompliance on

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269. For example, the guardian-ward relationship between the federal government and the tribes and the plenary power of the federal government with regard to the tribes. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823); *U.S. v. Wheeler*, 435 U.S. 313, 319 (1978) (noting "the undisputed fact that Congress has plenary authority to legislate for the Indian tribes").

270. 384 F. Supp. 312 (W.D. Wash. 1974) (holding that construction of the treaty between plaintiff tribes and the United States government upheld the tribes' right to 50% of available fishing).

both an official and private level.<sup>271</sup> If developing countries do not confront and resolve these fundamental questions in the present, they face the danger of greater legal and societal upheavals in the future.

#### A. OFFICIAL COMMITMENT TO INDIGENOUS RIGHTS

The experiences of both the United States and Australia demonstrate the negative impact on indigenous communities when governments are unable or unwilling to protect the rights that have been legally assured indigenous communities.<sup>272</sup> First, the frontier atmosphere currently prevailing in indigenous land in both Brazil and the Philippines<sup>273</sup> is disturbingly reminiscent of those failures.<sup>274</sup> It is imperative that governments in developing countries provide effective law enforcement in disputed areas. History demonstrates all too well that in an atmosphere of lawlessness, the survival of indigenous peoples is put in peril: The land-hungry

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271. See *Puget Sound Gillnetters Assoc. v. United States Dist. Court for W. Dist. of Washington*, 573 F.2d 1123, 1126 (9th Cir. 1978) ("Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.") (citations omitted).

272. Despite the Treaty of 1868 that guaranteed the Sioux the absolute and permanent right to the Black Hills, when gold was discovered in the Black Hills, President Grant secretly ordered the army to cease its efforts to prevent would-be miners from invading the area in 1875. See Lope, *supra* note 268, at 341 (1994).

In Australia, the succession of Governors and Protectors woefully failed to fulfill their duties toward the Aboriginal populations as land-hungry settlers invaded further inland. See Gumbert, *supra* note 121, at 11-15; Cassidy, *A Reappraisal of Aboriginal Policy*, *supra* note 111, at 373-34.

A modern Australian example of the results of a lack of governmental commitment is demonstrated by the application of the Community Living Areas Act. The Northern Territory government, playing to its pastoral industry constituents, has obstructed the grant of pastoral leases to Aborigines living in poor conditions on pastoral properties. See *More Living Areas Won Back . . . But the Fight Goes On*, *Land Rights News*, Sept. 1996, at 21. As of mid-1996, seven years after the passage of the Act, only seven excisions have been granted. See Stead, *supra* note 140.

273. In both countries, indigenous populations live in remote regions. Thinly staffed law enforcement agencies provide inadequate protection and may themselves act outside the law, while lawless elements of the populations take advantages of the situation, transgressing even the limited protections legally owed to indigenous tribes. See, e.g., Jamie Drummond, *Tribes Who Won't See the Forest for the Sleaze*, *The Independent* (London), Jan. 4, 1997, available in 1997 WL 4470037.

274. In both countries, violent confrontations have lead to the deaths of both indigenous people and other citizens. See *Philippines' Tribes Fear Being Displaced by Reforestation*, *Agence France-Presse*, Mar. 10, 1995, available in 1995 WL 7775383; Christie, *supra* note 215; Weatherford, *supra* note 259.

settlers of the United States and Australia massacred the native peoples of those countries in their drive for land.<sup>275</sup>

Second, tribal groups do not usually wield great economic or political power, and the distribution of land ownership in Brazil and the Philippines, as in other developing countries, is alarmingly skewed, concentrating vast territories in the hands of a small elite.<sup>276</sup> Such ownership is rarely challenged and developers do not insist on their right to open such land for public use. Instead, it is the ancestral lands of indigenous peoples that are targeted for appropriation by state and private developers.<sup>277</sup>

To realize legal protections guaranteed indigenous populations, all branches of government must be dedicated to the ideals espoused by the legislative and executive branches of government. In the past, the military in both the Philippines and Brazil were half-hearted in their protection of their indigenous communities.<sup>278</sup> Key officers must be re-educated and military goals must be refocused in order to protect both indigenous populations and the development projects operating within their territories.

The judicial branch of government should play a crucial role in the official commitment to indigenous rights. Here the United States sets a good example. First, American courts have crafted rules of treaty interpretation that have been used to protect the rights of Native American tribes who have entered into treaty relationships with the federal government. Treaties must be

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275. See Gumbert, *supra* note 113, at 12; Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossessing the Indians in Seventeenth-Century America: Essays in Colonial History* 15 (James Morton Smith ed., 1980).

276. In Brazil, more than half of the land belongs to one percent of the landowners. See Jan Rocha, *Last Stand in the Never-ending Trade Wars: Five Hundred Years After Columbus, Indigenous Americans Are Still Being Brutalized*, *Guardian* (London), Sept. 18, 1992, available in 1992 WL 8844198. In the Philippines in 1988, almost one-quarter of the agricultural land was owned by 0.2% of the population. See Robert Weissman, "Development" and the Denial of Human Rights in Ramos's Philippines, 7 *Harv. Hum. Rts. J.* 251, 259 (1994).

277. See, e.g., Jack Epstein, *Decree Endangers Survival of Brazil's Indians*, *Christian Sci. Monitor*, Mar. 7, 1996, available in 1996 WL 5039862.

278. Due to the location of their habitats, tribes in the Philippines have often been the mistaken targets of anti-insurrectionist military strikes against Muslim rebels. See U.S. State Dept. Dispatch, *Philippine Human Rights Practices 1994* (1995). The Brazilian military has been among the more vocal opponents of indigenous land rights. See *Second Thoughts About Yanomami: Pressure on the Biggest Reservation is Growing*, *Latin Am. Regional Rep.: Brazil*, Feb. 16, 1995, at 7, available in LEXIS, News Library, Lan File. The growing population pressures and the incursions of *garimpeiros* in Brazil is increasingly accompanied by violence against tribal peoples there. See Goering, *supra* note 17.

interpreted as the tribe would have understood them at the time of execution.<sup>279</sup> Second, United States courts have also applied a strict fiduciary standard to the United States government's dealings with Native American tribes.<sup>280</sup> Neither Brazil nor the Philippines has entered into treaties with their indigenous peoples. Nevertheless, the application of an analogous fiduciary standard by Brazilian and Philippine courts to the Brazilian and Philippine governments' interactions with their indigenous populations could yield valuable dividends. The application of such a standard would have the two-fold effect of strengthening indigenous rights and forcing government policy makers to become more attuned to the impact of legislation and government action on indigenous peoples.

Australia's judicial branch has also set a good example in this area. The recent *Mabo* and *Wik Peoples* decisions of the Australian High Court provide an inspiring illustration of judicial independence and commitment to truthful interpretation of the law. Despite the weight of more than two centuries of discriminatory application of Australian property law, the Court interpreted the law so as to be true to the international human rights and indigenous norms now existing and previously ignored in Australian case law.<sup>281</sup> Such independence of the judiciary in both Brazil and the Philippines would provide another layer of security in the protection of indigenous rights.<sup>282</sup>

## B. LAND CLAIM/RECOGNITION/COMPENSATION PROCEDURE

As neither the Philippines nor Brazil has recognized indigenous land rights through treaties or other agreements with their indigenous people, the Australian model of statutory guarantees may be

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279. See Getches, *supra* note 9, at 158; see also Wilkinson & Volkman, *supra* note 92, at 617-18.

280. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and . . . exploited people . . . Its conduct . . . should therefore be judged by the most exacting fiduciary standards.").

281. See *supra* Part II.B; cf. *Mabo v. Queensland* (1993) 66 A.L.R. 408; *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141.

282. In the Philippines, the supreme court has begun to assert its independence. In February 1997, invoking a "Filipino First" policy in the Philippine Constitution, it revoked the winning bid of a Malaysian conglomerate for a controlling share in historic hotel property in Manila. See Martin Abbugao, *Philippine Judiciary Emerges as New Hurdle to Open Economy*, *Agence France-Presse*, Feb. 10, 1997, available in 1997 WL 2056202.



more easily transplanted to those countries than the common law doctrines that were developed in the United States.<sup>283</sup> Brazil and the Philippines are civil law countries and, as such, their judiciary cannot "discover" new rights not present in their civil codes.<sup>284</sup> However, both the Philippine and Brazilian judiciary do have the authority to uphold the rights articulated within their constitutions.<sup>285</sup> As with all constitutions, however, some danger exists that an amendment of either constitution could eliminate indigenous land rights. While such an attempt is unlikely in the face of serious domestic and international opposition, it is not impossible.

The constitutional rights of Brazil's Indians are demonstrably stronger than the constitutional rights of the indigenous peoples of the Philippines. The right of Brazilian Indians to occupy and possess their land is recognized by the constitution and their titles to their ancestral land is both inalienable and nontransferable.<sup>286</sup> In contrast, the Philippine Constitution, while recognizing the existence of rights to ancestral lands and exhorting their protection, does not delineate the contours of those rights.<sup>287</sup> Nevertheless, under both the Brazilian and Philippine Constitutions, the state owns the lands that indigenous peoples have traditionally occupied. As in the implementation of the Australian Aboriginal Land Rights (Northern Territory) Act,<sup>288</sup> therefore, grant of secure ownership to indigenous communities will not impair ownership rights of third parties.

The uncertainty surrounding indigenous land rights currently prevailing in the Philippines and Brazil demonstrates the need for a procedure independent from governmental and powerful third-party pressure to delineate the parameters of those rights. The Australian and American experiences give ample evidence of the

283. For example, the fiduciary duties attributed by the federal courts to the United States government stem from the guardian-ward relationship first outlined by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

284. See Justice Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts From a Comparative Perspective*, 54 Ohio St. L. J. 559, 562-65 (1993). Contrast the discovery of the Australian High Court, more than two centuries after settlement, that native (aboriginal) title to land did exist at common law. See *supra* Part II.B.

285. See constitutional analyses, *supra* Part III. The legal tradition of the civil law is not an absolute bar to searching judicial review. See Utter & Lundsgaard, *supra* note 284, at 570-72.

286. See *supra* Part IV.B.2.

287. See *supra* Part IV.A.4.

288. See *supra* note 133 and accompanying text.

necessary elements of a successful land claim procedure. These include the following: (1) taking into account indigenous patterns of landholding and use (and therefore tacit incorporation of traditional indigenous laws);<sup>289</sup> (2) including information in discussions regarding the adverse consequences that could attach to third parties from a recognition of aboriginal title;<sup>290</sup> (3) creating an independent legal/administrative body to consider and give informed recommendations on claims to the official in charge of indigenous affairs and the federal legislature; and (4) establishing regional indigenous land agencies, funded by revenues from economic activities by outsiders on indigenous land, that are fully answerable to the indigenous communities who would elect representatives to the agency responsible for their areas.<sup>291</sup>

Acknowledging and incorporating indigenous land ownership patterns in the land claims procedures is important for two reasons. First, governments may win the confidence and cooperation of indigenous people in development endeavors. Second, the legal acknowledgment of indigenous cultural patterns of land ownership will strengthen national public respect for indigenous culture. This would serve the two-fold purpose of enhancing indigenous culture and adding to the vibrancy of the national heritage.

Furthermore, the inclusion of information on the possible negative impact of the recognition of indigenous ownership will serve to open discussions regarding such conflicts. All interested and affected parties would have a chance to meet and negotiate on equal terms, increasing the probability of attaining solutions

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289. The land claim procedure directed by the Land Rights Act validates the laws and traditions of the Aboriginal claimants even while applying Western legal doctrines. Under the procedure, the claimants present the evidence of their spiritual ties to the claimed land. See generally G. Hiley, *Aboriginal Land Claim Litigation*, 5 *Austr. Bar Rev.* 187 (1989). The result is an amalgam of European-type land-owning and management structures integrated with Aboriginal ownership structures. See *McRae et al.*, *supra* note 114, at 150. Land demarcation in Brazil and the grant of ancestral lands in the Philippines already are based on anthropological, historical, environmental, and topographical studies. See *Rocha*, *supra* note 217; see also *Tribe Applies For Ancestral Domain Claim Certificates*, *BusinessWorld* (Manila), Sept. 26, 1996, *available in* 1996 WL 11854268.

290. The Brazilian Presidential Decree could be an attempt to incorporate this policy. See *supra* note 257 and accompanying text.

291. Sections 21-38 of the Land Rights Act created independent bodies (land councils) that are the expert advocates for aboriginal land rights. Not only do they choreograph the claim procedure, but they also assist with the management and economic development of aboriginal land in accordance with the wishes of the owners. These councils are funded by mining royalties from mines on aboriginal lands under § 64 and are headed by councils elected from the various communities under § 29.

satisfactory to all. In addition, the judicial body in charge of making the recommendations should be fully aware of all pertinent facts before making its decisions. An impartial body that is independent from the other governmental structures will, because of its neutrality, engender the confidence of both indigenous people and development advocates.

The requirement of representation by elected members of the indigenous communities will also ensure that the needs of the communities are adequately appraised. This body could serve as a training ground for leaders in the indigenous community, allowing them to garner leadership experience that can then be applied on behalf of their people, on both the national and international stage.

Other provisions that could provide a model for the protection of indigenous land rights include those in the Australian Native Title Act. These provisions state that aboriginal title should not be extinguished by all grants of interest by the sovereign,<sup>292</sup> rather, when the interest has run its course, aboriginal title should resume. Such a provision could be of enormous utility in the Philippines, where indigenous communities have not received secure titles to their ancestral lands, despite their claims to, and use and possession of, land in the public domain. Ancestral lands have, in some cases, been leased for twenty-five year periods to logging companies.<sup>293</sup> Compensation for the loss of traditional use during the period of the lease, and affirmation of title after the leasehold interest is ended, would stem the tide of dislocation of those communities.

Where title has been irrevocably lost because of the weight of history and current ownership patterns, compensation is due to indigenous peoples.<sup>294</sup> Their close attachment to and dependence on land for the continuance of their lifestyles lead to the conclusion that compensation should take the form of other land grants and,

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292. See Native Title Act, § 238 (1993) (Austl.) (the non-extinguishment principle). The recent decision in *The Wik Peoples*, see *supra* note 151, and the ensuing turmoil have stimulated calls for amendment of this feature of the Native Title Act. See Kuppusamy, *supra* note 154.

293. See Philippines Tribes Fear Being Displaced by Reforestation, *Agence France-Presse*, Mar. 10, 1995, available in 1995 WL 7775383.

294. Both Convention 169 and the Draft Declaration require such compensation. See Part II for a summary and analysis of these instruments.

unless unavoidable, should not be monetary.<sup>295</sup> The actions of the Sioux Nation of North America demonstrate the dissatisfaction of indigenous groups with monetary compensation, which cannot replace their spiritual ties to their land. The treaty between the Sioux and the United States specified that the sacred Black Hills of the Sioux Nation would belong to the Sioux Nation forever. The subsequent discovery of gold led to the Sioux Nation's loss of the Black Hills.<sup>296</sup> The Sioux Nation's claim for the return of the Black Hills was upheld by the Supreme Court, which awarded the tribe \$105 million.<sup>297</sup> This money continues to accrue interest in the bank as the Sioux maintain their pursuit for justice — the return of their land.<sup>298</sup> Instead of quieting title and allowing the indigenous peoples to confront their future from a position of strength, the inevitable result is a continuation of dissatisfaction and legal challenges.

Under Section 192 of the Native Title Act, the Australian government has created a national fund to assist indigenous groups deprived of their land to acquire and manage substitute land. Both Brazil and the Philippines should adopt a similar scheme, funded by payments from developers on indigenous lands. The creation of an impartial and centralized system of compensation would lessen the fears and frustrations of indigenous people whose losses have been uncompensated. The guarantee of just and adequate compensation might also lessen indigenous objections to development.

In addition, the United States experience makes clear that title should be given to an entire community and not vest in individual members. The fundamental objective of indigenous land rights and recognition is the survival of indigenous *communities*. The Allotment Acts<sup>299</sup> in the United States, which vested ownership of

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295. A key cause of the failure of the Indian Claims Commission was that its mandate did not include the return of land wrongfully seized. Instead, compensation in all cases was monetary. For a general description of the shortcomings of the Commission, see John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. Rev. 325 (1969). At the time of writing, Vance was Chairman of the Commission.

296. See *supra* note 272.

297. See Lope, *supra* note 268, at 349 (1994); *U.S. v. Sioux Nation of Indians*, 448 U.S. 371, 390, 434 (1980) (affirming the award to the Sioux of \$17.1 million with five percent interest accruing from 1877).

298. See Lope, *supra* note 268, at 349.

299. See, e.g., General Allotment (Dawes) Act of 1887, as amended, 25 U.S.C. §§ 331, 334, 339, 341–42, 349, 354, 387.

tribal lands in individuals, have proved disastrous for the land ownership of those tribes.<sup>300</sup> Lands that were subject to the allotment statutes were transferred to non-Native American hands at an inordinate rate — often due to fraud and ignorance — and those that were not transferred frequently are the subject of claim by numerous claimants descended from the original owners.<sup>301</sup> This has led to an undesirable decline in indigenous land ownership and an increase in conflicts within the tribes.<sup>302</sup>

### C. SECURITY OF OWNERSHIP

The Third Criterion necessary to satisfy both development demands and indigenous rights is security of ownership. Unlike Australia and the United States, both Brazil and the Philippines recognize the land rights of their indigenous peoples and have entrenched these rights in their constitutions.<sup>303</sup> The recent developments in Brazil and the failure of the Philippine government to pass enabling legislation indicate, however, that such title is not secure and is therefore subject to legislative whim. By contrast, Australia has chosen to make land granted under the Land Rights

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300. See Getches, *supra* note 9, at 198.

301. See *id.* The multiplicity of owners has led to logistical difficulties in utilizing allotted land in an economically viable fashion. See generally Comment, Too Little Land, Too Many Heirs — The Indian Heirship Land Problem, 46 Wash. L. Rev. 709 (1971). The United States Congress has acknowledged and sought to remedy the adverse economic impact. In 1983, it enacted the Indian Land Consolidation Act, which sought to escheat to relevant tribes interests in land that had fallen below a specified percentage of the property at issue. See Indian Land Consolidation Act, 25 U.S.C. § 2201 (1983). In *Hodel v. Irving*, the Supreme Court ruled the statute to be a taking without just compensation. 481 U.S. 707 (1987). In *Babbitt v. Youpee*, the Supreme Court again found the statute to effect an unconstitutional taking, despite Congress's attempt to fix it. 117 S.Ct. 727 (1997). This example from the United States experience demonstrates both the possible negative consequences of trying to force indigenous land ownership patterns into a conventional Western mold, and the difficulty of correcting misguided policies regarding indigenous land.

302. See generally Too Little Land, Too Many Heirs, *supra* note 301. The adverse effects of individual land ownership can already be observed in Brazil. For example, the Guarani people have been squeezed onto small reservations, and live on individually owned plots in villages established between 1915 and 1928. See Katherine Ellison, *Suicides are Tragic Protest Symbol Among Brazilian Indians*, San Diego Union Trib., Mar. 23, 1996, available in 1996 WL 2149347. As the population has grown and the plots have been subdivided, overcrowding, unemployment, and other social ills have led to the highest suicide rate among native peoples in the Americas. See *id.*

303. See constitutional analyses, *supra* Parts IV.A.2, IV.B.2.

Act inalienably vested in indigenous communities.<sup>304</sup> In the United States, the federal government usually holds title to communal tribal land, with the undivided beneficial interest belonging to the tribe as a single entity.<sup>305</sup> This community ownership format affords maximum protection to the indigenous land base.

Developing countries should adopt a model between that of Australia and that of the United States. Indigenous land title should be as secure as that of other citizens. Due to the vulnerability of indigenous communities and the attraction of their land to developers, alienability should be restricted.<sup>306</sup> Therefore, before interests of indigenous lands can be alienated, an approval procedure that would require the following should be adopted: (1) the consent of a supermajority of the adult members of the particular communities; (2) the approval of the regional land agencies (or other independent indigenous agency); and (3) the recommendation of the official in charge of indigenous affairs for the government.<sup>307</sup> Full alienability is wholly contrary to the aims of the indigenous struggle for land rights. However, grants of exploitation and other leasehold interests could further benefit indigenous people. The land must always revert to its indigenous owners once the interest conveyed has expired.

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304. Some scholars have questioned the security of this ownership, pointing out that statutory provisions are always subject to amendment. See, e.g., *McRae et al.*, *supra* note 114, at 312. The backlash against the Native Title Act and the new policy direction of the newly elected conservative government demonstrate the validity of those warnings. The new government is under significant pressure to limit the scope of application of the Act. See *Australian Court Opens Landmark Land Rights Case*, *Rocky Mountain News*, June 16, 1996, available in 1996 WL 7574833. The government's recent budget cuts, centering on Aboriginal programs, inspired riots in the capital city. See *id.*

305. See *Getches*, *supra* note 9, at 295.

306. At first glance this recommendation seems to carry the taint of paternalism. However, events in both the Philippines, involving the loss of land by tribal people through fraud and other suspect transactions, and in Brazil, involving the effects of individual ownership on the Guarani native peoples, demonstrate the wisdom of this proposal. See *supra* notes 179, 182, 302 and accompanying text. Since a key premise of this Article is that indigenous people depend on a secure land base for their survival, it would be contradictory to suggest that the land, once ownership is acknowledged and secured, be fully alienable.

307. The obstacles to development will help to ensure that only well-funded would-be developers, with well-planned development projects and the willingness and ability to work toward a consensus with indigenous people, would succeed in the implementation of development projects. Ideally, the need to satisfy three levels of representation will ensure that only the best projects are approved, as well as that all issues relevant to indigenous peoples, their environment, and their living conditions will be weighed.

## D. CONTROL OF AND PARTICIPATION IN DEVELOPMENT PROJECTS

The Fourth Criterion necessary for the satisfaction of both development needs and the protection of the land rights of indigenous communities is the participation in and control by indigenous communities of development within their territories. This criteria is not a new idea,<sup>308</sup> but it often has not been followed in its true spirit.<sup>309</sup>

The interests of developers and of indigenous communities need not be mutually exclusive. While indigenous communities wish to maintain their traditional lifestyles as much as possible, they are also aware of the world around them and their need to be economically viable.<sup>310</sup> Cooperation with development in a controlled setting could answer many of the needs of indigenous people, as well as provide a satisfactory compromise to developers and governments. Where, as in the Philippines, the quality of life of indigenous people — including life expectancy and education and employment rates — is low, controlled development may be a desirable option. In return for providing the natural resources and physical setting, the indigenous communities can demand employment opportunities in return, as well as the creation of infrastructure, such as roads, plumbing and electricity, that can serve their interests. Other beneficial facilities, such as educational and health institutions, could also be introduced. The indigenous people's knowledge of the land and other environmental factors means that consultation with them could serve to minimize the deleterious environmental impact of development projects.

This consultation and participation procedure is already followed in Australia with regard to mining on Aboriginal land in the

308. It has been expressed in the Declaration on the Right to Development, *supra* note 23, Convention 169, and the Draft Declaration on Indigenous Rights. See *supra* Part II.

309. In the Philippines, the Lumad people assert that their consent to mining on their ancestral lands was fraudulently obtained. See Position of the Lumad People of Saln'ong, Oct. 10, 1996 (unpublished manuscript, on file with the *Columbia Journal of Law and Social Problems*).

310. In both the Philippines and Indonesia, bioprospecting companies search for "new" plant species on indigenous land. See Margot Cohen, *People Power: Bioprospectors Learn to Work with Indigenous Groups*, *Far E. Econ. Rev.*, Jan. 11, 1996, available in 1996 WL-FEER 7997977. In the United States, mining and other activities take place on indigenous land. The land may be leased to the companies, or the tribe may undertake its own economic ventures. See Getches, *supra* note 9, at 22-26. In Australia, Aboriginal groups negotiate with mining companies regarding exploration and mining on their land. See, e.g., Jawoyn Sign Another Major Mining Deal, *Land Rights News*, Sept. 1996, at 3.

Northern Territory.<sup>311</sup> Before exploration licenses are granted,<sup>312</sup> negotiations must take place with the communities, represented by the land councils. Approval of any agreement must be made by the land council, the Northern Territory Minister, and the Minister for Aboriginal and Torres Strait Islander Affairs.<sup>313</sup>

This type of procedure should be extended to other commercial or development activities proposed on indigenous land, with the layers of protection commensurate to the environmental and lifestyle impact anticipated from the project. Although this process may be lengthy and seem more costly, the hoped-for end result will be that only well-planned development and commercial activities will be approved. Given the failure and financial loss that often result from ill-conceived projects,<sup>314</sup> this process should only lead to advantages for all concerned. The beneficiaries would include other members of the population who would be served by the projects and who might gain additional employment opportunities, as well as the developers, who are more likely to invest in promising projects.

In addition, where the biodiversity, environmental, or cultural significance of the land is great, the partnership schemes pioneered in Australia could be readily adopted in both Brazil and the Philippines.<sup>315</sup> There, both the Kakadu National Park (a United Nations World Heritage Area) and the world-famous Ayers Rock (Uluru) were returned to Aboriginal ownership and then leased back to the government.<sup>316</sup> Management agreements with the

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311. See Jawoyn Sign Another Major Mining Deal, *supra* note 310.

312. Under Australian legal doctrine, as in Brazil and the Philippines, ownership of most subsoil minerals and other resources vests in the sovereign. See McRae, *supra* note 114, at 187. Nevertheless, this scheme of granting exploration licenses has proven to be successful for some Aboriginal communities. See, e.g., Tanami Mine Open, 2 Land Rights News, No. 38, Feb. 1996, at 10; Promise of Real Jobs Delivered, Land Rights News, Feb. 1996, at 10. This type of property doctrine should therefore not be an impassable barrier to the adoption of such a format in either Brazil or the Philippines.

313. See Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.).

314. See Nemenzo, *supra* note 180 and accompanying text for an account of the damage to ill-constructed dams necessitating the construction of new dams on the traditional territory of Philippine tribes and further dislocation of the tribes; see also Hitchcock, *supra* note 8, at 12 for a list of development projects that have had negative consequences for indigenous peoples.

315. Conservation International, a Washington environmental organization, has ranked the Philippines as number one in the world in terms of biodiversity. See Meg Bortin, The Philippines Struggles to Salvage Its Beauty, Progress vs. Ecology/A Battle for the Future, *Int'l Herald Trib.*, June 13, 1996, available in 1996 WL 4091379.

316. See, e.g., Kakadu Lease-Back, 2 Land Rights News, No. 40, Sept. 1996, at 5.



government allow thousands of visitors a year to visit areas of the parks that Aboriginal owners have permitted to be opened to the public.<sup>317</sup> The agreements provide for training and employment opportunities for the Aboriginal owners.<sup>318</sup> The implementation of a similarly ecologically sensitive scheme could slow down, or even halt, the alarming diminution of the Brazilian and Philippine rain forests. Development projects within the boundaries of such areas should be instituted only after thorough consultation with the indigenous communities affected and careful planning against possible adverse consequences.<sup>319</sup>

The Four Criteria proposed in this Article are not a cure-all for the challenges facing developing countries and their indigenous populations as other principles and policies must also be implemented in order for the positive effects of the Criteria to be fully realized. Nevertheless, their adoption and effectuation are fundamental prerequisites for the meaningful recognition of indigenous land rights and the survival of viable indigenous communities in developing countries.

## VI. CONCLUSION

The challenges confronting the world's indigenous people share an unfortunate similarity, and have become more urgent in the current climate of economic globalization and the push toward greater economic development. The United States and Australia provide examples of policies and principles that could be useful in balancing indigenous land rights with the demands of economic development. The application of these principles to the Philippines and Brazil, two typical developing countries where indigenous land

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317. There are sacred sites within the park area that are not open to the public. Letter from Dr. Ian McIntosh, Regional Anthropologist for West Arnhem Land, Northern Land Council, to Karen Bravo, *Colum. J.L. & Soc. Probs.* (April 5, 1997) (on file with the *Columbia Journal of Law and Social Problems*).

318. Despite federal ownership of one-third or more of 11 western states and 32.6% of all land nationwide, no such initiative has been undertaken in the United States. See Barsh, *supra* note 95, at 75.

319. The Ranger Uranium Mine operates within the boundaries of Kakadu National Park in Australia. Plans by the mining company to open another uranium mine within Kakadu National Park has evoked protest from environmentalists. See Australian Government Backs Controversial New Uranium Project, *Agence France-Presse*, Mar. 22, 1996, available in 1996 WL 3825551. The Aboriginal land owners also oppose the opening of a second mine on their land. See *Aboriginals Say Mine Needs Their Consent*, Dow Jones Commodities Service, Jan. 14, 1997, available in Westlaw, 1/14/97 DJCOMS 02:23:00.

rights are currently of particular concern, can provide guidance to other developing countries facing those same challenges. By learning from these experiences, governments in both of those developing countries can assure that they meet the Four Criteria for satisfying both indigenous land rights and development imperatives.

*The Ozakas contend that the past cannot be undone, and the indigenous sentients who survived the conquest and settlement should not, by virtue of genetic happenstance, be favored above other Ozakan citizens on Terra. Not only do the indigenous sentients have no cognizable property rights under the current system, but recognition of such rights would retard efficient exploitation and development of planetary resources, and create upheaval in the settled Ozakan land tenure system. Nevertheless, it is clear that neglecting the problem now will lead to more severe conflicts that will have to be addressed in the future.*